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CASES DECIDED IN UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

VOLUME 2

CUSTOMS CASES ADJUDGED IN THE
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

October 1983 to October 1984

RUTH A. BUTLER
ADMINISTRATIVE SERVICES OFFICER

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*Appointed May 7, 1984.
**Appointed September 14, 1984.

Designation of Judges To Serve on United States Court of Appeals for the Federal Circuit

The Honorable Richard B. Kellam, Senior District Judge, U.S. District Court, Eastern District of Virginia, October 4, 5, 6, 1983

The Honorable John Minor Wisdom, Senior Circuit Judge, U.S. Court of Appeals, Fifth Circuit, November 7, 9, 10, 1983

The Honorable Edward D. Re, Chief Judge, U.S. Court of International Trade, December 7, 8, 9, 1983

The Honorable Morgan Ford, U.S. Court of International Trade, January 10, 11, 1984

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McLaughlin & Freeman *v.* United States, 21 CCPA 446; 293 U.S. 557.
Marks Co. *v.* United States, 28 CCPA 286; 343 U.S. 584.
Marks Co. *v.* United States, 12 Ct. Cust. Appls. 110; 266 U.S. 625.
Mason, Inc., United States *v.*, 51 CCPA 107; 379 U.S. 999.
Matsushito Electric Industrial Co. *v.* United States, 60 CCPA 85; 414 U.S. 821.
Mayers, Osterwald & Muhfeld, Inc. *v.* D. F. Bendler & U.S., 18 CCPA 117; 283 U.S. 828.
Metropolitan Petroleum Corp., United States *v.*, 42 CCPA 38; 348 U.S. 858.
Michelson & Co., United States *v.*, 12 Ct. Cust. Appls. 402; 267 U.S. 603.
Meyers & Co., Inc., United States *v.*, 24 CCPA 464; 302 U.S. 714.
National Starch Products, Inc., United States *v.*, 50 CCPA 1; 373 U.S. 923.
Neumann-Endler, Inc. *v.* United States, 27 CCPA 306; 310 U.S. 649.

Pan American Standard Brands, Inc., United States, *v.*, 51 CCPA 107; 379 U.S. 999.

Park & Tilford Import Corp. *v.* United States, 26 CCPA 342; 307 U.S. 645.

Pennsylvania Salt Mfg. Co., United States *v.*, 26 CCPA 232; 306 U.S. 646.

Perez, United States *v.*, 36 CCPA 114; 338 U.S. 827.

Pillsbury Flour Mills Co., United States *v.*, 25 CCPA 351; 304 U.S. 582.

Porto Rico Brokerage Co. *v.* United States, 23 CCPA 259; 298 U.S. 671.

Procter & Gamble Mfg. *v.* United States, 19 CCPA 415; 287 U.S. 629.

Rathjen Bros., United States *v.*, 31 CCPA 70; 320 U.S. 797.

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Richardson Co., United States *v.*, 36 CCPA 15; 336 U.S. 936.

Rifkin Textiles Corp. *v.* United States, 54 CCPA 138; 389 U.S. 931.

Rosenbaum Grain Corp. *v.* United States, 26 CCPA 202; 307 U.S. 629.

Salomon & Bros. *v.* United States, 26 CCPA 302; 307 U.S. 633.

Sandoz Chemical Works *v.* United States, 13 Ct. Cust. Appls. 466; 271 U.S. 677.

Savannah Sugar Refining Corp. *v.* United States, 20 CCPA 227; 288 U.S. 615.

Schenley Import Corp., United States *v.*, 34 CCPA 74; 302 U.S. 782.

Schieffelin Co. *v.* United States, 57 CCPA 66; 400 U.S. 869.

Schmidt Pritchard & Co., United States *v.*, 47 CCPA 152; 364 U.S. 919.

Sears, Roebuck & Co., United States *v.*, 20 CCPA 295; 290 U.S. 633.

S. Stern & Co. *v.* United States, 51 CCPA 15; 377 U.S. 909.

Standard Oil Co. of New Jersey *v.* United States, 29 CCPA 82; 314 U.S. 669.

Star Industries, Inc., United States *v.*, 59 CCPA 159; 409 U.S. 1076.

Stephenson, United States *v.*, 52 CCPA 17; 382 U.S. 814.

Stone & Downer Co. *v.* United States, 19 CCPA 259; 287 U.S. 619.

Straub & Co., United States *v.*, 41 CCPA 209; 348 U.S. 823.

Tuscany Fabrics *v.* United States, 49 CCPA 77; 409 U.S. 845.

Vandegrift & Co., United States *v.*, 18 CCPA 356; 284 U.S. 623.

Veolay, Inc. *v.* United States, 32 CCPA 101; 297 U.S. 711.

Von Damm *v.* United States, 25 CCPA 97; 302 U.S. 722.

Weigert-Dagen, United States *v.*, 39 CCPA 58; 342 U.S. 947.

Whelan & Sons *v.* United States, 39 CCPA 168; 344 U.S. 818.

Wilbur-Ellis Co. *v.* United States, 187 CCPA 472; 284 U.S. 623.

Willoughby Camera Stores, Inc., United States *v.*, 21 CCPA 322; 292 U.S. 640.

Wislar *v.* United States, 26 CCPA 138; 305 U.S. 629.

Zenith Radio Corporation *v.* United States and Montgomery Ward & Co., Incorporated, 69 CCPA 96; 459 U.S. 943; 103 S.Ct. 256, 74 L.ED.2d 200; *cert. denied,* Oct. 18, 1982.

[illegible]

CASES ADJUDGED IN UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMERICAN AIR PARCEL FORWARDING COMPANY, LTD., A HONG KONG CORPORATION; AND E. C. MCAFEE COMPANY, A MICHIGAN CORPORATION, FOR THE ACCOUNT OF AMERICAN AIR PARCEL FORWARDING COMPANY, LTD., APPELLANTS *v.* UNITED STATES OF AMERICA: THE SECRETARY OF THE TREASURY; UNITED STATES CUSTOMS SERVICE; THE COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE; THE ASSISTANT COMMISSIONER OF CUSTOMS (COMMERCIAL OPERATIONS), UNITED STATES CUSTOMS SERVICE; DIRECTOR, OFFICE OF REGULATIONS AND RULINGS, UNITED STATES CUSTOMS SERVICE; AND DISTRICT DIRECTOR OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, DETROIT, MICHIGAN, JOINTLY AND SEVERALLY, APPELLEES

Appeal No. 83-716

721 F.2d 1546

(Decided October 14, 1983)

Jonathan Miller, of Southfield, Michigan, and *Richard A. Kulics*, of Centerline, Michigan, argued for appellants.

Joseph I. Liebman, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Susan Handler-Menahem*.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

Before FRIEDMAN and NIES, *Circuit Judges*, and SKELTON, *Senior Circuit Judge*.

NIES, *Circuit Judge*.

This is an appeal from a final order of the United States Court of International Trade, 557 F. Supp. 605 (Ct. Int'l Trade 1983), dismissing an action in which appellant importers challenge the basis on which the United States Customs Service has made and is making its valuation of made-to-measure clothing produced in Hong Kong. The Court of International Trade held that jurisdiction over the action could not be founded on 28 U.S.C. § 1581 (h) and (i) as asserted by the importers. We affirm.

BACKGROUND

American Air Parcel Forwarding Company, Ltd., a Hong Kong corporation, is a foreign freight consolidator which handled shipments from Hong Kong to the United States of made-to-measure clothing which is the subject of this action.

E.C. McAfee Company is a customshouse broker and is the importer of record of the 12 entries listed in an attachment to the pleadings.

The facts of the transactions are disputed by the parties and we will say only that the subject clothing is custom made by tailors in Hong Kong for individual U.S. customers who order the merchandise in the United States through salesmen for Hong Kong distributors.

The present appeal stems from the efforts of appellants (collectively "importers") to bar the assessment of duty based on the sales price paid by the United States consumer (approximately $200.00). Importers assert that the valuation must be based on the payment in Hong Kong by the distributors to tailors for "cut, make and trim" operations plus the cost of material (approximately $75.00).

While only 12 specific entries are identified in an attachment to the pleadings, appellants assert that hundreds of additional unliquidated entries, as well as future importations, are the subject of the complaint. The complaint itself is couched in broad terms of seeking "review of the arbitrary and capricious revocation of a ruling issued by the U.S. Customs Service and the arbitrary and capricious refusal by that agency and its representatives to rescind that revocation." Jurisdiction is asserted under 28 U.S.C. § 1581(h) and (i)(4).[1]

With respect to the identified shipments, these entries were made in Detroit between March 3, 1980, and August 1, 1980, by McAfee, for the account of Air Parcel, who paid estimated duties based on the Hong Kong transactions. Air Parcel billed only this amount to the U.S. consumer in addition to the charge for the merchandise. Apparently other Customs field offices proposed to assess identical merchandise at the price paid by U.S. consumers on the ground that there was no "sale" in Hong Kong within the meaning of the applicable statute. In January 1980 the District Director of Detroit, Michigan, at the behest of the importers, initiated a request for internal advice from the Office of Regulation and Rulings. Based on representations by the importers as to the facts of the Hong Kong apparel trade, the response was made on October 17, 1980, with certain provisos, that:

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[1] 28 U.S.C. 1581 provides in pertinent part:

§ 1581. Civil actions against the United States and agencies and officers thereof

* * * * * * *

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) Revenue from imports or tonnage;

(2) Tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) Embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) Administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

> *Holding.*—On the basis of the information provided, it is our opinion that the sales between the tailors and distributors in Hong Kong of made-to-measure clothing are appropriate for establishing export value under the new law * * *.

This holding is denominated TAA #10 and was published in the Customs Bulletin on March 11, 1981.

On March 12, 1981, the San Francisco District Director requested Customs Headquarters (Director, Classification and Value Division) to reconsider the holding in TAA #10.

On July 23, 1981, the Customs Service issued a response to the request for reconsideration, affirming TAA #10, but advising that an investigation to verify the facts upon which the ruling was based had been initiated.

In September 1981 the investigation was completed and the Office of Regulation and Rulings concluded that the trade patterns in the Hong Kong made-to-measure clothing industry conflicted with the pattern stated in the request for internal advice. On September 9, 1981, a telex was transmitted to Customs offices stating the above conclusion and requiring the assessment of duties on the basis of the price paid by the U.S. consumer.

On October 19, 1981, the Customs Service advised Air Parcel by letter that TAA #10 was revoked pursuant to 19 CFR § 177.9(d) and that, pursuant to 19 CFR § 177.9(d)(2)(ii), the revocation was retroactive. This retroactive revocation is the heart of the controversy.

In November 1981 the 12 identified entries were liquidated with duties being assessed on the price paid by U.S. consumers. A protest was duly filed by McAfee on February 1, 1982. On February 4, 1982, no action having been taken on the protest and no payment having been made of liquidated duties, the importers filed a complaint in the Court of International Trade, followed by a motion for preliminary injunction seeking, *inter alia,* cancellation of these liquidations and reinstatement of TAA #10. The Government moved to dismiss for lack of jurisdiction. The court denied the motion to dismiss and granted the motion for a preliminary injunction on August 31, 1982. Within a few days thereafter, the Court of Customs and Patent Appeals handed down a decision in *United States* v. *Uniroyal, Inc.,* 687 F.2d 467 (CCPA 1982), defining the scope of jurisdiction of the Court of International Trade under 28 U.S.C. § 1581 (h) and (i). On the basis of this decision, the court granted the Government's renewed motion to dismiss and dissolved the injunction by order of January 19, 1983. The importers appeal from this order.

Importers allege that as a practical matter they are unable to collect additional duties from U.S. consumers after merchandise is delivered inasmuch as cost of collection exceeds the amount involved. Because of the revocation of TAA #10, and the greatly increased duties it must pay on hundreds of entries, Air Parcel asserts that it has been driven into bankruptcy.

I

The Court of International Trade, in holding that 28 U.S.C. § 1581(i) did not grant jurisdiction to the court over the complaint, provided the following analysis:

> Reviewing 28 U.S.C. § 1581(i), frequently referred to as the residual or "catch-all" jurisdiction provision, the court finds no legislative intent to grant a litigant use of this forum where the litigant has failed to exhaust the avenue of protest and denial before the Customs Service and payment of liquidated duties. In the leading case recently issued by the United States Court of Customs and Patent Appeals, (now the United States Court of Appeals for the Federal Circuit), the court succinctly stated:
>
>> Nevertheless, the legislative history of the Customs Courts Act of 1980 demonstrates that Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service.
>
> *The United States* v. *Uniroyal, Inc.*, 687 F.2d 467, 471, Appeal 82-9 (September 2, 1982).
>
> It is judicially apparent that where a litigant has access to this court under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach complying with all the relevant prerequisities thereto. It cannot circumvent the prerequisities of 1581(a) by invoking jurisdiction under 1581(i) * * * .

557 F. Supp. at 607.

The above interpretation of the *Uniroyal* decision is entirely correct. Importers argue, however, that the *Uniroyal* holding itself recognizes that the traditional avenue of protest and appeal under § 158(a) need not be utilized if it does not provide an "effective" remedy, *supra*, or if "inadequate as a matter of due process." (687 F. 2d at 475 Nies, J., concurring).

Importers assert that the § 1581(a) remedy is ineffective, as a matter of due process, in three well defined areas: (1) where a complaint raises a constitutional question, (2) where the Customs regulations have built unconscionable delay into the protest and review procedures, and (3) where procedures to safeguard the rights of the public are violated.

A

In essence, the constitutional issue asserted by importers is that there is a denial of due process whenever an agency fails to follow either a statute or a regulation which has the force of law. "Unlawful actions" by the Government, in the importers' view, "are a direct violation of the Constitution." The importers cite no authority for their proposition nor propose any limitation, and we find the importers' thesis basically unsound. Every instance in which the Government fails to act in accordance with a statute or regulation does not raise a constitutional issue. Indeed, the purpose of judicial review in customs cases is to determine the correctness of governmental action. Thus, the "exception" to the holding of *Uniroyal* which the importers seeks to create appears to us to encompass all such cases. An importer would need only to express a challenge, for example, to valuation which is involved here, in terms of a constitutional wrong. We entirely agree with the Court of International Trade that the traditional avenue of approach to the court under 28 U.S.C. § 1581(a) was not intended to be so easily circumvented, whereby it would become merely a matter of election by the litigant. By artful pleading alone a litigant would be able to change the entire statutory scheme Congress has established. The different requirements of § 1581(a) and § 1581(i) with respect to standing (28 U.S.C. § 2631); statutes of limitation (28 U.S.C. § 2636); amendment of claims (28 U.S.C. § 2638); burden of proof (28 U.S.C. § 2639(a)(1)); and standards of appellate review (28 U.S.C. § 2640) would become optional.

The importers attempt to draw a parallel between the instant case and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), in which an individual who had been deprived of a disability benefit without a hearing prior to the cancellation of benefits was allowed judicial review of the issue of whether such hearing was necessary as a matter of due process without going through a post-cancellation hearing prescribed by agency regulations. Contrary to the importers' view, the *Eldridge* case does not support their position. In *Eldrige*, the claimant did not seek to avoid the statutory jurisdiction requirements but to invoke the court's jurisdiction pursuant to the statute. Crucial to the *Eldridge* decision on the jurisdictional issue was the holding that the only mandatory jurisdictional requirement necessitated by the statute was a "final decision" by the agency and that this "nonwaivable jurisdictional element was satisfied." 424 U.S. at 329–30.

Unlike *Eldridge*, importers here seek to avoid the jurisdictional prerequisites set up by the statute. The Customs Service may not waive the statutory requirements that a protest must be *filed* to prevent finality of assessments,[2] or that duties must be paid before commencing a civil action involving the protest.[3] These provisions would operate irrespective of a suit under 28 U.S.C. § 1581(i). Moreover, had Air Parcel wished to avoid the financial distress in which it finds itself, judicial relief was available prior to importation under 28 U.S.C. § 1581(h), as discussed *infra*. Importers admittedly were aware prior to the importation of the merchandise that the basis for valuation was disputed and apparently proceeded to enter transactions placing themselves in a precarious position with knowledge of this risk. Their plight cannot be attributed to deficiencies in the statute.

That importers here could fashion a more desirable remedy does not make the remedy fashioned by Congress constitutionally inadequate. As stated in *Jerlian Watch Co.* v. *United States*, 597 F. 2d 687, 692 (9th Cir. 1979), a case in which an importer sought relief in district court [4] to avoid the Customs Courts jurisdictional prerequisite of payment of duty:

> Plaintiffs' allegations of financial impossibility, even if accepted as true, do not place them within the "adequate remedy" exception. The dispositive consideration in determining whether plaintiffs have an adequate remedy is the nature of the barrier and not its financial height. Any financial barrier is inherent in the system established by Congress, and must have been recognized by Congress when it enacted 19 U.S.C. § 1514(a). It is true that injunctive and declaratory relief is a more desirable remedy in plaintiffs' view, but "the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate." *J.C. Penney Co.* v. *U.S. Treasury Department*, 439 F. 2d at 68.

B

Contrary to importers' argument, the Customs Service regulations have not built unconscionable delay into the protest procedure. Indeed, a protestor need not await a decision by the agency before filing suit. The regulations provide an accelerated procedure for reaching the court within 120 days. 19 CFR § 174.22(a)-(d). Upon the filing of a suit, the court has discretion to require exhaustion of administrative remedies, 28 U.S.C. § 2637(d), and importers' arguments that the usual requirement to exhaust administrative remedies should be waived would be relevant to the exercise of that discretion. However, importers not only failed to utilize the procedure for obtaining accelerated consideration of its protest but also resorted to additional review procedure, thereby further delaying a Customs Service decision. Thus, importers' argument that relief has been delayed for eighteen months because of the regulations, thereby making judicial review under 5 U.S.C. § 1581(a) deficient as a matter of due process, is wholly without foundation.

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[2] 19 U.S.C. § 1514(a) provides in pertinent part:

> [D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> (1) the appraised value of merchandise;
>
> * * * * * * *
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or a civil action contesting the denial of a protest, in whole or in part is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 [28 U.S.C. §§ 2631 *et seq.*].

[3] 28 U.S.C. § 2637(a) reads as follows:

> A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade, only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced.

[4] As discussed in *United States* v. *Uniroyal, Inc.*, 687 F. 2d 467, 475, n. 9 (Nies, J., concurring) enactment of 28 U.S.C. § 1581(i) transferred the subject matter jurisdiction of the district courts to the Court of International Trade.

C

Importers' final position under 28 U.S.C. § 1581(i) is that the Customs Service must follow its own regulations which are designed to protect the public. While importers devote a substantial portion of their brief to exposition of how the Customs Service violated established procedures, we do not find any relationship between the merits of this argument and the jurisdictional issue. There is no dispute that the issue of violation of a regulation can be raised in a protest and subsequent civil action.

The decision of the Court of International Trade holding that it lacked jurisdiction to entertain the importers' complaint under 28 U.S.C. § 1581(i) is, accordingly, affirmed.

II

As an alternative basis for jurisdiction, importers rely on 28 U.S.C. § 1581(h). The requirements to invoke this provision are:

(1) Judicial review must be sought *prior* to importation of goods;
(2) Review must be sought of a ruling, a refusal to issue a ruling or a refusal to change such ruling;
(3) The ruling must relate to certain subject matter; and
(4) Irreparable harm must be shown unless judicial review is obtained *prior to* importation.

The Court of International Trade was persuaded that the term "ruling" in § 1581(h) did not include a response to a request for internal advice. The court stated:

> Of paramount interest is defendants' argument relating to the type of ruling to which section 1581(h) applies. The ruling in issue, TAA #10, is an internal advice ruling which is authorized under Customs regulations, 19 CFR § 177.11. Defendants argue that Congress specifically exempts internal advice ruling from being subject to judicial review under section 1581(h). In support of its contention defendants cite directly a portion of the law's legislative history * * *. "*In determining the scope of the definition of a 'ruling,' the Committee does not intend to include 'internal advice' or a request for 'further review', both of which relate to completed import transactions.*

> (Emphasis supplied). H.R. Rep. No. 96-1235, *supra,* 46," The Court believes that the underscored legislative history is convincing.

557 F. Supp. at 608.

The Government argues that requests for internal advice can only be made with respect to goods which have been imported. It does appear that § 1581(h) was intended to provide an importer with review of a ruling contained in a "ruling letter" issued to him [19 CFR § 177.9(b)] which can only be obtained prior to importation of goods. The provisions appear to be parallel. However, we do not need to rule on this issue but merely note that the importers failed to utilize this procedure which detracts from their argument of hardship.

The purported basis for invoking § 1581(h) put forth by the importers is that the revocation of TAA #10 affects future imports they plan to make. A similar argument was made and rejected in *Uniroyal,* where the court held, 687 F.2d at 472:

> In addition, to the extent that Uniroyal's prayer for relief is directed to future importations of uppers and soles, Uniroyal has not demonstrated the "irreparable harm" Congress has required before the trial court can exercise jurisdiction over an appeal of a ruling prior to the importation of goods and the filing and denial of a protest. [Footnote omitted.]

Here, as well, importers have not demonstrated irreparable harm with respect to future imports. The evidence of harm on which they rely is the financial burden of past transactions. No showing of harm has been made with respect to future imports. Moreover, the importers are aware that the increased duty must be taken into account in future dealings with customers.

As a final matter, a § 1581(h) case would not provide relief for past transactions which are the principal subject matter of this complaint. Declaratory relief only is available. 28 U.S.C. § 2643(c)(4).[5]

Thus, importers have wholly failed to meet the requirements of § 1581(h).

III

Finally, the importers claim that the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.,* (APA) gives the Court of International Trade "the right to fashion the appropriate remedy, without hindrance of the usual procedure, when there are Constitutional violations of the type and nature suffered by American Air." However, clear precedent exists that the APA is not a jurisdictional statute and does not confer jurisdiction on a court not already possessing it. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

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[5] 28 U.S.C. 2643(c)(4) reads:

In any civil action described in section 1581(h) of this title, the Court of International Trade may only order the appropriate declaratory relief.

Thus, the APA does not give an independent basis for finding jurisdiction in the Court of International Trade. Rather, 28 U.S.C. § 1581 is the jurisdictional statute which governs this case. As the importers have failed to establish jurisdiction under 28 U.S.C. § 1581 for the reasons recited above, the decision of the Court of International Trade is *affirmed*.

AFFIRMED

THE YOUNG ENGINEERS, INC., (AKA TYE OR TYE, INC.), APPELLANT v. U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

Appeal No. 83-649

721 F.2d 1305

(Decided November 8, 1983)

Joseph E. Mueth, of Los Angeles, California, argued for appellant.

Jane K. Albrecht, of Washington, D.C., argued for appellee. With her on the brief were *Michael H. Stein*, General Counsel and *Michael P. Mabile*, Acting Assistant General Counsel for Litigation.

Appealed from U.S. International Trade Commission.

Before NICHOLS,* and NIES, *Circuit Judges*, and COWEN, *Senior Circuit Judge*.

NIES, *Circuit Judge*.

This appeal, in a proceeding under 19 U.S.C. § 1337, raises two novel issues: (1) whether following disapproval by the President of the determination in an investigation, the International Trade Commission must institute a new investigation in order to exercise its authority to issue an exclusion and/or cease and desist order based on previously found unfair acts; and (2) whether, under principles of *res judicata*, a dismissal with prejudice of an infringement suit against appellant precludes a holding that appellant infringes complainant's patents. Our jurisdiction of this appeal is under 19 U.S.C. § 1337(c) and 28 U.S.C. § 1295(a)(6). We answer both questions in the negative in this instance, and, finding no merit in any other defense, we affirm the determinations of the Commission. *Certain Molded-In Sandwich Panel Inserts and Method for Their Installation*, Inv. No. 337-TA-99, USITC Pub. No. 1246, 218 USPQ 832 (1982).

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*Judge Nichols assumed senior status October 1, 1983, following submission of the case.

I

The subject investigation is the culmination of a patent controversy between Shur-Lok Corporation (Shur-Lok), complainant, and The Young Engineers, Inc., (TYE) appellant, which goes back many years. Shur-Lok is a domestic manufacturer of devices, called sandwich panel inserts, used in aircraft production.[1] Shur-Lok is the owner of three patents associated with the device:

> U.S. Patent No. 3,282,015, issued November 1, 1966, covering the device.
>
> U.S. Patent No. 3,271,498, issued September 6, 1965, and U.S. Patent No. 3,392,225, issued July 9, 1968, both covering methods of installing inserts in the sandwich panels.

TYE has been importing sandwich panel inserts from Japan since the mid-60's. After Shur-Lok charged TYE with selling infringing inserts, apparently TYE began importing a modified device. Shur-Lok objected to the latter as well and, in 1969, filed suit in the United States District Court for the Central District of California, Civil Action No. 69-265, charging infringement of the patents which are the basis for the § 1337 investigation.

Specifically, Shur-Lok charged TYE with directly infringing Shur-Lok's U.S. Patent No. 3,282,015 for the insert and with actively inducing others to infringe U.S. Patent Nos. 3,271,498 and 3,392,225. Shur-Lok's complaint prayed for both a permanent injunction against future infringement and damages for past infringement.

TYE answered the complaint alleging that the patents were invalid and not infringed and also asserted these defenses in declaratory judgment counterclaims. Following discovery by way of depositions, document productions, and interrogatories, trial was set to commence in the district court on July 11, 1972. However, on July 6, 1972, Shur-Lok moved to postpone the trial, expressly seeking either to attempt settlement of the suit or "to voluntarily dismiss the action with prejudice."

On July 11, 1972, Shur-Lok filed its "Motion to Dismiss with Prejudice" pursuant to Fed. R. Civ. P. 41(a)(2) which allows dismissal only upon "such terms and conditions as the court deems proper." Shur-Lok represented to the court that the industry had greatly deteriorated during pendency of the suit, that TYE's infringement of the patents did not justify the expense of the trial, and that TYE could expect no more favorable judgment than if the suit were tried, unless the patents were held invalid. TYE objected to dismissal, *inter alia,* seeking recovery of its considerable attorney fees. At the hearing, the court stated in granting the motion:

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[1] A sandwich panel is a lightweight structure formed by securing a honeycomb core between two skin sheets. Sandwich panels are used in the construction of lavatories, galleys, walls, floors, control surfaces and other parts of aircraft. Sandwich panel *inserts*, the products in issue, are used for anchoring attachments onto the panels. The inserts are inserted into a sandwich panel and anchored into place by a "potting" compound. Each insert has an injection port for insertion of the potting compound, and a venting and an inspection port. A threaded bore provides means for mechanical attachment.

The accused devices which were apparently sold by TYE had either two or three ports. The findings of fact suggest that only three port devices were sold by TYE at the time of the 1969 infringement action, although this fact is disputed by TYE.

Apparently other models of the device, two port devices, were imported by TYE some seven or eight years after the 1972 dismissal. Both two and three port devices were the subject of the Commission investigation.

> Plaintiff in this case cannot bring a suit against this Defendant involving any of the issues of validity of the patent or the claims of the patent here * * *.
>
> [T]he counterclaim is dismissed without prejudice that the Defendants can at any time, in the event they feel any injury or damage, sue the Plaintiffs again.

The final judgment, entered July 25, 1972, simply dismissed the complaint with prejudice and the counterclaims without prejudice. Thereafter, TYE continued its importation of inserts of various designs without objection from Shur-Lok.

On March 27, 1981, Shur-Lok initiated the present proceedings before the Commission by filing a complaint alleging, *inter alia,* that TYE and five purchasers [2] from TYE were in violation of § 337 of the Tariff Act of 1930 (19 U.S.C. § 1337(a)) [3] because of unfair acts, namely, infringement of Shur-Lok's patents, in the importation and sale of the devices. Shur-Lok also charged TYE with misappropriation of trade secrets but this charge was dropped early in the investigation. The Commission instituted Investigation No. 337-TA-99 on April 29, 1981. The complaint and notice of investigation were amended on August 7, 1981, to add as respondents, the Japanese manufacturer of the subject imports, Hariki Metal Industries, and the exporter, Kyoei Trading Corporation of Japan.

In its answer to Shur-Lok's complaint, TYE raised the affirmative defenses of *res judicata,* laches, and estoppel, all in essence based on the prior litigation. Prior to the hearing on the merits, TYE moved for summary determination on the grounds that the investigation was precluded by the *res judicata* effect of the 1972 judgment. The administrative law judge (ALJ) denied the motion, after consideration of the record of the prior litigation, on the grounds that the civil action and the Commission proceeding were separate causes of action and that there was not complete privity between the parties in the civil action and the Commission proceeding. Thereafter, an evidentiary hearing on the merits of the complaint was held before the ALJ. TYE did not appear or participate in that phase of the proceedings. The ALJ found that the asserted patents were valid and infringed and these findings were adopted by the Commission. The Commission also held that the proceeding was not barred by the doctrine of *res judicata* and that TYE waived its defenses of laches and estoppel.

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[2] The five domestic purchasers of the subject inserts include C & D Plastics, Hitco Corporation, Composites Unlimited, U.O.P. Aerospace, and Weber Aircraft.

[3] 19 U.S.C. § 1337(a) reads:

> (a) Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

To implement its determination of § 1337 violations, the Commission issued a general exclusion order prohibiting the importation of infringing inserts for the remaining life of the '015 patent; a cease and desist order prohibiting TYE from selling imported inserts acquired subsequent to institution of the investigation where such sales would contribute to or induce infringement of the '225 and/or '498 patents; and cease and desist orders to three of TYE's customers Weber Aircraft, Hitco and U.O.P. Aerospace, prohibiting their use of the imported inserts.

Following action in an investigation, the ITC must forward the matter to the President who may disapprove the ITC action for policy reasons. 19 U.S.C. § 1337(g)(2). In this case the President exercised that authority, transmitting his disapproval of the Commission's determination on June 28, 1982. Pertinent portions of the President's notice of disapproval state:

> The effect of the cease and desist orders directing the three purchasers not to use imported products when practicing a process in the United States that infringes a process patent may not be in compliance with U.S. international obligations. The orders may result in less favorable treatment in requirements affecting purchase and use being accorded imported products than treatment being accorded domestic products. The three orders do not stop infringement of the process patents in the U.S. Because of the statutory limits on USITC jurisdiction, those orders can only act as restrictions on the purchase and use of the imported products.
>
> My disapproval of the USITC determination in this case in no way circumscribes the USITC authority to issue cease and desist orders. Cease and desist orders are more flexible remedies than exclusion orders and are appropriate in cases where an importer is the wrongdoer. The discriminatory effect upon imported products of the three orders directed to the users of those products forms the basis of my decision to disapprove in this case.

Since the rationale for the President's disapproval was limited to the three cease and desist orders directed to domestic users, on August 3, 1982, the Commission issued a notice proposing "modification" of the determination disapproved by the President. Of particular importance here, the Commission did not reopen the record on the merits or otherwise institute a new investigation. In issuing this notice, the Commission denied the request of the complainant Shur-Lok that the Commission initiate a new investigation. TYE also objected to the procedure, but on the ground that such action was out of time, that is, contrary to the one year statutory period mandated by 19 U.S.C. § 1337(b)(1) for completion of an investigation, and on the ground that the Commission's failure to reopen the investigatory record was contrary to due process and the Administrative Procedures Act.

After the submission of comments by Shur-Lok and TYE, the Commission voted on September 8, 1982, to modify its findings on remedy, the public interest, and bonding to be consistent with the policy considerations underlying the President's disapproval of the original remedy determination. On September 17, 1982, the Commission issued the following orders:

> (1) A general exclusion order prohibiting the importation of infringing inserts for the remaining life of U.S. Patent No. 3,282,015; and
>
> (2) A cease and desist order directed to TYE prohibiting it from selling imported inserts acquired subsequent to institution of the investigation where such sales would contribute to or induce infringement of U.S. Patent Nos. 3,271,498 and/or 3,392,225.

The matter was again submitted to the President, no disapproval resulted (although the Commission's procedure was questioned), and the determination thus became final for purposes of appeal.

II

Procedure

The initial question raised by this appeal is whether presidential disapproval of the determination in this investigation terminated the investigation for all purposes.

In *Aktiebolaget Karlstads Mekaniski Werkstad* v. *USITC*, 705 F. 2d 1565, 1578, 217 USPQ 865, 874–75 (Fed. Cir. 1983), (hereinafter *Headboxes* case) this court approved the procedure where, following presidential disapproval, the ITC instituted where, following presidential disapproval, the ITC instituted a second investigation, "salvaged from the first investigation * * * the record and the findings and conclusion of the presiding officer [*i.e.*, the administrative law judge]," and set up a procedure whereby evidence concerning new issues could be added to the record.

The shortcut taken here removes an additional step. The ITC did not start a second investigation but treated the investigation as an open and pending matter in connection with which orders could be issued to effectuate a remedy. Moreover, the record on the merits was not reopened although written comments on the "modified" remedy were received.

The problem arose here as in *Headboxes* because the investigation concerned a number of related but distinct acts of unfair competition. It is the practice of the ITC to consider such charges in a single "investigation" and to present a single "determination" and what might be called a "single composite remedy" to the President. Even though the statute is clear that an exclusion order and a cease and desist order are alternative remedies,[4] the Commission has adopted the view that § 1337(f)(1) is not an absolute bar to both kinds of orders in a single investigation when the conclusion is reached that there are various unfair acts.

With respect to the propriety of both types of orders in this case, the Commission ruled:

> Issuance of the orders discussed above does not conflict with the "in lieu of" language of section 337(f) or with the Commission decision in *Doxycycline* [38] because the various orders are directed at different unfair acts. The general exclusion order is aimed at infringement of the '015 *product* patent. The cease and desist orders issued against Hitco, Weber aircraft, and UOP Aerospace are aimed at *direct* infringement of the two method patents. The cease and desist order issued against TYE is directed at *induced* and *contributory* infringement of the method patents. Thus, this case is analagous to the *Stoves I* [39] investigation where the Commission issued both an exclusion order and cease and desist orders, but directed at separate and distinct unfair acts.
>
> ---
>
> [38] Inv. No. 337-TA-3, Doxycycline, USITC Pub. 964 (April 1979). Commissioner Stern does not reach the issue of whether there are different unfair acts. See opinion of Commissioners George M. Moore and Paula Stern, concurring in part and dissenting in part, Doxycycline, p. 22.
>
> [39] Inv. No. 337-TA-69, Certain Airtight Cast-Iron Stoves, USITC Pub. 1126 (Jan. 1981). [Emphasis in original.]

A somewhat similar problem arising from a "partial" termination of an exclusion order was discussed in *SSIH Equipment Co.* v. *USITC,* 718 F.2d 365, 218 USPQ 678, 683, n. 8 (Fed. Cir. 1983), note 8 (*SSIH II*):

> S-W does not assert that an exclusion order could not be terminated in part. Such a position would raise only a formalistic, not substantive, objection. By practice, the Commission issues exclusion orders covering several independent bases for exclusion of goods rather than separate exclusion orders for each. The multiple based approach was taken here in that goods infringing any *one* of the claims were excluded. Thus, in practical effect, the June 19 order may be thought of as separate orders on each claim, only two of which were not terminated on August 10. While the Commission's order of August 10, 1981, was phrased in terms of "suspension" of a portion of the earlier order, its effect was partial termination. We are not bound to consider it anything less because of the words used. *Cf. Rohm & Haas Co.* v. *USITC,* 554 F. 2d 462, 463, 193 USPQ 693, 694 (CCPA 1977) (Commission order granting motion to dismiss without prejudice held with prejudice).

As indicated in the presidential disapproval letter here, the President had no alternative but to veto the determination although he disapproved only part of the remedy. Had each violation been set forth separately with its appendant remedy, and sent to the President as separate determinations, the President would have been in a position to disapprove only the determination connected with the cease and desist orders which he found unacceptable. Thus, on the facts of this case as in *SSIH II*, we believe that it would be formalistic to upset the action taken by the Commission unless the statute leaves no alternative.

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[4] 19 U.S.C. § 1337(f)(1) provides:

In lieu of taking action under subsection (d) or (e) [permanent and interim exclusion orders], the Commission may issue * * * an order directing such person to cease and desist from engaging in the unfair methods or acts involved. [Emphasis added.]

With respect to the statutory effect of presidential disapproval, the principal dispute between the parties is over the interpretation of § 1337(g)(2) which reads:

> (2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall have *no force or effect.* [Emphasis added.]

In TYE's view "no force or effect" means null and void. The Commission argues that since the President can disapprove only for policy reasons, the determination, including the orders, remains valid but ineffective. TYE counters that, even if that view were accepted, the ITC in this case did not meet the statutory time limitation of one year to complete an investigation inasmuch as the orders issued more than a year after the investigation began. The ITC answers that it has authority under 19 U.S.C. § 1337(h) and 5 CFR § 211.57 to change its orders after the twelve month period. For convenience we will dispose of the last two arguments first.

A

Contrary to the ITC's view, we see no authority in § 1337(h) to support the action by the Commission here.

Section 1337(h) reads:

> *Period of Effectiveness*
>
> (h) Except as provided in subsections (f) and (g) of this section, any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

5 CFR § 211.57, which implements this provision, in relevant part reads.

> (a) Whenever any person believes that changed conditions of fact or law, or the public interest, require that *a final Commission action* be modified or set aside, in whole or in part, such person may file with the Commission a motion requesting such

> relief. *The Commission may also on its own initiative consider such action.* [Emphasis added.]

The Commission reasoned that a determination is "final" on conclusion of an investigation, that is, before action by the President. A precedential interpretation on this point was made in *SSIH II*, 718 F.2d at 365, 218 USPQ at 683, in which this court held that the statute provides that an ITC determination (including remedy) becomes *effective* upon publication in the Federal Register, that is, prior to submission to the President, but is not *final* until presidential approval is given or the 60-day period for review expires without disapproval. As stated therein:

> S-W confuses the "effectiveness" of a determination with its "finality." While Commission determinations are not *final* for purposes of appeal to this court until the review period has run, they are otherwise "effective upon publication * * * in the Federal Register," Section 337(g)(2). During the Presidential review period, products are in fact excluded from entry except under bond.

Thus, Commission orders are "effective" before they are "final," not "final" and then "effective."

Reliance on the authority of § 1337(h) to "modify" an order which is no longer in effect after presidential disapproval is, thus, misplaced. It seems beyond argument that § 1337(h) relates to an order in effect and how long it will "continue in effect." Moreover, this section explicitly recognizes that an order is no longer in effect at an earlier date if disapproved by the President under § 1337(g). Thus, the exclusion order and cease and desist orders having been rendered of no effect under § 1337(g), there simply was no order thereafter to "continue in effect." What the Commission actually did was *to issue* new orders. No authority can be found in § 1337(h) to issue exclusion orders but only to end the effectiveness of an outstanding order where "the conditions which led to such exclusion from entry or order no longer exist." 5 CFR § 211.57 cannot, and does not, provide greater authority than the statute. Moreover, § 211.57 itself speaks of "final Commission action"—a condition that the original orders never achieved. Thus, to this extent, the Commission's analysis must be rejected.

B

On the other hand, we also reject TYE's argument that the subject orders are *ultra vires* because untimely under § 1337(b). This section provides, in pertinent part:

> 1337(b)(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make

> its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation.

If the "determination" which the Commission must "make" within the year includes the issuance of its remedy orders, TYE's position would be correct. However, the legislative history of the Trade Reform Act of 1974 suggests that "determination" in § 1337(b) means only the conclusion that there is a violation or no violation of § 1337(a).[5] The word "determination" appears in other paragraphs of § 1337, but its meaning is confused rather than clarified by comparison of the various clauses in which it appears. In subsections (d) and (e) (providing authority to issue exclusion orders) "determination" again appears to encompass only the holding of violation under subsection (a), whereas in subsection (c), remedy is referred to as a "finding" but, anomalously, the paragraph also refers to "a determination" under (d), (e), or (f). Subparagraph (f) clearly relates only to remedy, i.e., issuance of a cease and desist order in lieu of an exclusion order under (d) or (e). Thus, remedy could itself be considered a separate "determination."

Provided with no clear meaning of "determination" in the statute, we defer to the Commission's interpretation that § 1337(b)(1) time limitations are satisfied if the Commission completes its investigation, makes a determination of "violation," and issues an initial remedy order within the prescribed time period (19 CFR § 210.15).

In reaching this conclusion, we have taken into consideration TYE's argument that the time limitations are designed to provide a time frame for the unfair acts. We do not agree with this premise. Since the time period is coupled with a direction to complete an investigation as soon as possible, it seems clear that its purpose is to insure speedy relief.

C

Returning to the initially posed issue of the meaning of "no force and effect" in § 1337(g)(2), we again agree with the Commission that the validity of its determination of violation is unaffected by presidential disapproval. The President may disapprove only "for policy reasons," not because of the merits of an investigation.

As indicated above, the determination and initial remedy are effective immediately. Goods are excluded unless and until disapproval by the President. Thus, "no force or effect" can be given a meaning less forceful than "null and void" and have substantial purpose in the statute. After disapproval, the determination of violation, which by § 1337(b) mandates exclusion of goods, becomes ineffectual. That determination, however, does not thereby become void.

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[5] Sen. Rep. No. 1298, 93rd Cong., 2d Sess. (1974):

Section 337(b)(1) of the Act, as amended by the bill, * * * would provide that upon commencing an investigation under section 337, the Commission would publish notice thereof, and conclude such investigation and determine whether section 337 is being violated within one year from the date of publication, or in more complicated cases, within 18 months.

Thus, we see no basic impediment in the statute to treating the proceeding as pending and allowing a new remedy order to be issued on the basis of the determination of violation previously made. Requiring a second investigation would place a merely formalistic barrier in the way of expeditious relief.

Also, we see no circumstance here which indicates any basic unfairness in the Commission's procedures. The new orders were promptly issued after presidential disapproval; no more was done than eliminate some of the previous cease and desist orders; and no new issues requiring a hearing were asserted by any person who would be adversely affected. While TYE did assert that a hearing should have been held by reason of the "evaporation" of Shur-Lok's case, this assertion is premised on the erroneous view that a violation can only be predicated on conditions during the one year preceding issuance of an exclusion order, a view we reject. *Bally/Midway Manufacturing Co.*, v. *USITC*, 714 F.2d 1117, 219 USPQ 97, 100 (Fed. Cir. 1983). Thus, we find no violation of the statute or due process in the procedure followed.

III

Res Judicata

This appeal raises another issue of first impression, specifically, what effect, under principles of *res judicata*, a final judgment of a federal district court in prior patent infringement litigation should be given in a subsequent § 1337 proceeding.

In this case the "unfair methods of competition and unfair acts" found to be prohibited by 19 U.S.C. § 1337(a) are predicated on patent infringement. While three patents are involved, for analysis we need only consider the '015 patent which consists of one claim directed to the product, i.e., the insert itself. This patent was held by the Commission to be infringed by the inserts imported by TYE, and the acts of TYE, thus, were found to be proscribed by § 1337(a). As indicated, the same patent was asserted by Shur-Lok against TYE in the district court litigation which ended by a dismissal with prejudice prior to trial. On the basis of the final judgment in its favor in that case, TYE asserts that Shur-Lok is wholly barred from relief in this proceeding.

The Commission found that the § 1337 investigation was not the same "cause of action" as the court case, stating that "the acts complained of here all happened *subsequent* to dismissal of the court case, and are apparently occurring on a larger scale" and because "TYE has introduced 8 new models of imported inserts within the last 18 months." The Commission then found the facts here comparable to those in *Lawlor* v. *National Screen Service*

Corp., 349 U.S. 322 (1955), where a second antitrust suit was held to be not barred because the acts complained of in the second suit were all subsequent to the first, the acts were "new" violations of a different nature and the defendant's monopoly had substantially increased. The Commission did not rely on the additional factors that the proceeding was based on a different statute giving rise to a remedy not available in the civil suit and involved the Government as a party, although these points are made in the Government's brief on appeal.

A

As an initial matter we note some confusion in the arguments of the parties in use of the terms "*res judicata,*" "collateral estoppel," "cause of action," and "claim" and "issue" preclusion. In our analysis we will be guided by the *Restatement (Second) of Judgments* (1982) which, in introductory note to § 13, provides the following basic statement:

> The principal concepts developed in this Chapter are: merger—the extinguishment of a claim in a judgment for plaintiff (§ 18); bar—the extinguishment of a claim in a judgment for defendant (§ 19); and issue preclusion—the effect of the determination of an issue in another action between the parties on the same claim (direct estoppel) or a different claim (collateral estoppel) (§ 27). The term "res judicata" is here used in a broad sense as including all three of these concepts. When it is stated that "the rules of res judicata are applicable," it is meant that the rules as to the effect of a judgment as a merger or a bar or as a collateral or direct estoppel are applicable.

The parties do not dispute that principles of "claim" preclusion, not "issue" preclusion, apply in this case.[6] A critical difference between these concepts is that issue preclusion operates only as to issues actually litigated, whereas claim preclusion may operate between the parties simply by virtue of the final judgment. Thus, principles of merger and bar may apply even though a judgment results by default, consent, or dismissal with prejudice although care must be taken to insure the fairness in doing so. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4419, 4442, 4443 (1981).

In this case, no issues were actually litigated in the prior suit. Thus, no "issue" can be said to have been determined or precluded. Therefore, if *res judicata* applies, it can only rest on principles of claim preclusion, that is, that the prior judgment *bars* the same "claim."

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[6] It should be noted that the quotation from the *Restatement* speaks in terms of *claims* and does not make reference to "causes of action." In some instances, a "cause of action" may be the equivalent of a "claim," but generally, reference to a "cause of action" in this connection leads to consideration of what have come to be regarded as irrelevant matters. *See Alyeska Pipeline Service Co.* v. *United States*, 688 F.2d 765, 769-71 (Ct. Cl. 1982) and *Container Transport International Inc.* v. *United States*, 468 F.2d 926, 928-29 (Ct. Cl. 1972), which follow the *Restatement* terminology and analysis.

The concept of a "claim" is described in § 24 of the *Restatement* as follows:

> **§ 24. Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"**
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what grouping constitutes a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Claim preclusion, where found, operates to bar subsequent assertion of the same transactional facts in the form of a different cause of action or theory of relief. Generally, this principle rests on the assumption that all forms of relief could have been requested in the first action. Again, the *Restatement* counsels:

> **§ 26(c). Where formal barriers existed against full presentation of claim in first action (Subsection (1)(c)).**
>
> The general rule of § 24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.
>
> The formal barriers referred to may stem from limitations on the competency of the system of courts in which the first action was instituted, or from the persistence in the system of courts of older modes of procedure.* * *

In this case, it is indisputable that the relief available in a § 1337 proceeding by way of total exclusion of foreign infringing merchandise was not available in the district court. Thus, it could be argued that no claim preclusion can ever apply in a § 1337 proceeding as a result of a judgment in a prior civil litigation. However, the evils of vexacious litigation and waste of resources are no less serious because the second proceeding is before an administrative tribunal. Moreover, the *Restatement* conclusions are directed to cases involving a second proceeding before another court, not before an administrative tribunal. Some adaptation of claim preclusion appears desirable, indeed necessary, in its application to administrative proceedings, but little guidance can be found in any authorities in such situations. The Commission itself did not rely simply on the unavailability of the § 1337 remedy in the court proceeding as, *ipso facto,* resolving the issue of preclusion, but rather took a more pragmatic approach with which we are generally in agreement.

In patent-based § 1337 proceedings, a pragmatic approach seems particularly appropriate. If a patent owner has unsuccessfully attacked an alleged infringer for the same infringing acts in a prior court proceeding, no substantive argument has been advanced as to why the patent owner should be given an opportunity to put forth the same charge of infringement again. The alleged infringer is as burdened by the litigation before the Commission as before a court. Moreover, if a second court proceeding would be precluded, there seems no reason that the Commission must devote time and attention to that matter. That "phase" of his claim is not one "which he was disabled from presenting in the first" action. (*Restatement, supra.*)

As stated in *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394, 401 (1981):

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Traveling Men's Ass'n.,* 283 U.S. 522, 525 (1931).

It is correct that a § 1337 proceeding is not purely private litigation "between the parties" but rather is an "investigation" by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States. Significantly, however, any determination of unfair acts is dependent upon the private rights between parties in the position of complainant and respondent. The 1975 amendment of the statute which added the provision in § 1337(c), "All legal and equitable defenses may be presented in all cases" was a major change which reflects a recognition that essentially private rights are being enforced in the proceeding. Were we to adopt the view that there is no bar to the reassertion of the same factual basis for relief simply because the Government is a party or the relief was not available in the first proceeding, we would effectively negate a significant defense which otherwise could be determinative of private rights. Moreover, if a complainant's infringement claim has been judicially settled and there is a legal right in the respondent to do the act claimed to be infringing, there would be no legitimate basis for the Commission's finding that such acts are "unfair." The additional requirements for relief in a § 1337 proceeding, e.g., that the patent must be the basis for a domestic industry, narrow the class of patent owners entitled to its benefits. Such requirements do not express an overriding independent governmental interest which insulates the Government from private defenses between parties, but rather these provisions restrict the instances in which relief can be granted.

Thus, we conclude that where the "infringement claim" which is the basis for the § 1337 investigation is a claim which would be barred by a prior judgment if asserted in a second infringement suit, that infringement claim may also be barred in a § 1337 proceeding.

B

The second and determinative issue here is whether the same infringement claim is being relitigated.

TYE argues that it has engaged in a continuing course of conduct which is the same—or substantially the same—as that attacked in the civil litigation. Moreover, the 1969 complaint sought all-encompassing relief against any and all acts of future infringement of the '015 patent. Thus, it is TYE's position that the dismissal with prejudice precludes any litigation against TYE based on the '015 patent. In effect, TYE would have us consider TYE to be a licensee. As such, no finding of unfair acts could be predicated on its importation of inserts which infringe the '015 patent, whether the products are the same or different from those involved in the suit. In this connection, we note that TYE did not seek to prove that the presently imported inserts are the same as those at issue in the civil action. Nor does TYE assert that the '015 patent was invalidated as a result of the suit. Rather, its defense rests purely on the theory that every charge of infringement against TYE based on the '015 patent is precluded.

Even under the broad view that a claim may embrace continuing conduct subsequent to the judgment, we find no authority that claim preclusion would apply to conduct of a different nature from that involved in the prior litigation. *Lawlor* v. *National Screen Service Corp., supra,* is clearly to the contrary.

With respect to patent litigation, we are unpersuaded that an "infringement claim," for purposes of claim preclusion, embraces more than the specific devices before the court in the first suit. Adjudication of infringement is a determination that a thing is made, used or sold without authority under the claim(s)[7] of a valid enforceable patent. Thus, the status of an infringer is derived from the status imposed on the thing that is embraced by the asserted patent claims, the thing adjudged to be infringing. By the same token, where the alleged infringer prevails, the accused devices have the status of noninfringements, and the defendant acquires the status of a noninfringer to that extent.[8] We reject TYE's theory that under principles of *res judicata* it became an unfettered licensee.

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[7] It is unfortunately necessary to use the word "claim" here in a different sense.

[8] *See Molinaro* v. *AT&T,* 460 F. Supp. 673 (E.D. Pa. 1978), *aff'd* 620 F.2d 288 (3rd Cir. 1980).

As the proponent of the defense of claim preclusion, the burden was on TYE to establish the defense by showing that the devices here were the same as those in the 1969 suit. TYE made no attempt to do so, resting its case on the legal theory that any charge of infringement based on the patent is barred, a clearly untenable position. Moreover, the Commission found that at least some of the devices before it were "new" models. The latter fact makes the case similar to *Lawlor* v. *National Screen Service Corp., supra,* where the purportedly similar series of acts were found to be in part different in nature. Moreover, that Shur-Lok might have obtained an injunction against TYE which would have prevented the sale of new models (as well as those actually in suit) does not change our view on this matter. As held in *Lawlor* v. *National Screen Service Corp.,* 349 U.S. at 328:

> This conclusion [of no claim preclusion] is unaffected by the circumstance that the 1942 complaint sought, in addition to treble damages, injunction relief which, if granted, would have prevented the illegal acts now complained of.

Thus, *res judicata* in the sense of claim preclusion has not been established. On the above basis, we affirm the decision of the Commission.

III

Laches and Estoppel

We would add that the defense of *estoppel* by the conduct of Shur-Lok is not foreclosed by the above analysis of *res judicata.* However, such estoppel does not arise simply because of the judgment, or because of laches, that is, delay in attacking TYE's subsequent activities.

Estoppel to assert the patent would require (1) an unreasonable and inexcusable delay, (2) prejudice to the defendant, (3) affirmative conduct by the patentee inducing the belief that it had abandoned its claims against the alleged infringer, and (4) detrimental reliance by the infringer. *A.C. Aukerman Co.* v. *Miller Formless Co.,* 693 F.2d 697, 701, 216 USPQ 862, 866 (7th Cir. 1982). TYE failed to submit any evidence to satisfy these requirements—in particular, it wholly failed to show any detrimental reliance or any equities which would make it manifestly unfair to issue the exclusion order or the cease and desist order, both of which operate prospectively only. Indeed, TYE asserts that it is no longer importing the inserts.

Accordingly, the determinations of the United States International Trade Commission are *affirmed.*

AFFIRMED

CARLINGSWITCH, INC., APPELLANT *v.* UNITED STATES, APPELLEE

Appeal No. 83-871

720 F.2d 656

(Decided November 8, 1983)

Charles P. Deem, of New York, New York, argued for appellant.

Jerry P. Wiskin, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge International Trade Field Office.

Before BENNETT, MILLER, and SMITH, *Circuit Judges.*

PER CURIAM.

We affirm the decision of the Court of International Trade granting the Government's motion to dismiss and adopt that court's opinion as our own. *Carlingswitch, Inc. v. United States,* 560 F. Supp. 46 (Ct. Int'l Trade 1983). We note that this case is controlled by *Carlingswitch, Inc. v. United States,* 651 F.2d 768 (CCPA 1981). *See also American Air Parcel Forwarding Co. v. United States,* No. 83-716 (Fed. Cir. October 14, 1983).

SIGMA INSTRUMENTS, INC., APPELLEE *v.* UNITED STATES, APPELLANT

Appeal No. 83-1028

724 F.2d 930

(Decided December 21, 1983)

Saul Davis, of New York, New York, argued for appellant. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge International Trade Field Office.

S. Richard Shostak, of Los Angeles, California, argued for appellee.

Appealed from: U.S. Court of International Trade. *Judge* NEWMAN.

Before MARKEY, *Chief Judge*, DAVIS and BENNETT, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeal from a judgment of the Court of International Trade (CIT) holding Sigma Instruments, Inc. (Sigma) entitled to the duty allowance prescribed by item 807.00 of the Tariff Schedules of the United States (TSUS)[1] for certain terminal pins (terminals). We affirm.

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[1] Item 807.00 TSUS provides:

Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their phys-

Continued

BACKGROUND

The facts are fully set forth in an opinion accompanying the judgment appealed from. *Sigma Instruments, Inc.* v. *United States,* 565 F. Supp. 1036 (Ct. Int'l Trade 1983). Essentially, Sigma claimed duty allowance only for terminals. The terminals were shipped from the U.S. to Mexico where they were incorporated into header assemblies (headers) by a transfer molding process in which the terminals were aligned with slots in the lower half of a mold and a viscous molding compound was forced into the mold cavity. The molding compound hardened to retain the terminals in the desired spaced relationship. Some headers are incorporated in relays, and the headers and relays are imported into the United States.

OPINION

ISSUE

Whether the CIT correctly determined that the terminals were not advanced in value other than by "assembly" within the meaning of 807.00 TSUS.

Because no error appears, we affirm the appealed judgment on the basis of the opinion filed by Judge Newman.

The following responds to the arguments presented by the government on appeal.

In an effort to show error, the government argues: (1) the meaning of "assembly" as joining of solids should control, absent proof of contrary congressional intent; (2) legislative history and administrative regulation mandate that definition; (3) the decisions of the Court of Customs and Patent Appeals (CCPA) mandate that definition; (4) otherwise painting, clearly incidental to assembly under item 807.00, would be "assembly"; (5) the headers and relays are new and different articles; (6) absent its definition, *Firestone Tire & Rubber Co.* v. *United States,* 364 F. Supp. 1394 (Cust. Ct. 1973), would render item 807.00 superfluous; (7) there is no assembly because the molding compound does not adhesively join the terminals to each other; (8) transfer molding is not incidental to assembly; and (9) formation of the header is further fabrication of the terminals.

(1)

The government's first and basic argument is adequately addressed in Judge Newman's opinion. Although an "assembly" does involve the joining or coming together of solids, *see e.g., E. Dillingham, Inc.* v. *United States,* 470 F.2d 629, 633 (CCPA 1972);

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[1] *Continued*

ical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

A duty upon the full value of the imported article, less the cost or value of such products of the United States (see headnote 3 of this subpart).

United States v. *Balis Bros.*, 451 F.2d 643, 645 (CCPA 1971), nothing in the statute requires that whether a component is a solid be determined as of the instant of initial contact. *See e.g., C. J. Tower & Sons of Buffalo* v. *United States*, 304 F. Supp. 1187 (Cust. Ct. 1969). The government concedes an "assembly" would occur if the headers were premolded with slots and the terminals were inserted into the slots. That Sigma achieves the same result more directly does not warrant denial of item 807.00 treatment.

(2)

The legislative history relied on is:

> Thus, item 807.00 would apply with respect to components of types which are designed to be fitted together with other components *and would not apply to chemical products, food ingredients, liquids, gases, powders, etc.* (emphasis added).

H.R. Rep. No. 342, 89th Cong., 1st Sess., 48–49.

The emphasized language identifies when item 807.00 does not apply, i.e., when the American component is a chemical product, food ingredient, etc. It does not restrict the nature of foreign made components of an assembly and provides no basis for reversal here. *See Tower, supra.*

The administrative regulation cited is 19 CFR § 10.16:

> The assembly operations performed abroad may consist of any method used to join or fit together solid components such as welding, soldering, riveting, force fitting, gluing, laminating, sewing or use of fasteners * * *. The mixing or combining of liquids, gases, chemicals, food ingredients and amorphous solids with each other or with solid components is not regarded as assembly.

Like the statute, that regulation does not require that whether a component is a solid be determined as of the instant of initial contact.

(3)

The decision in *J. E. Bernard & Co., Inc.* v. *United States*, 420 F.2d 1403 (CCPA 1970), involving a different statute, is distinguishable as explained in the opinion accompanying the appealed judgment.

Similarly, in *Texas Instruments, Inc.* v. *United States*, 681 F.2d 778 (CCPA 1982), the issue involved duty-free entry pursuant to the Generalized System of Preferences, 19 U.S.C § 2461 *et seq.*, not item 807.00. Moreover, the molding process there was one of many steps performed on silicon slices, each with integrated circuits (ICs), including scribing and breaking, mounting the ICs, connecting lead wires, molding, trimming, and severing. These fact differences are so great as to preclude a view of Texas Instruments as requiring that the present process not be held an "assembly".

(4)

The argument that because paint is initially liquid but becomes solid, and because item 807.00 makes painting incidental to assembly, every assembly process which begins with a liquid component and ends with solids must be outside item 807 overlooks the differences between the present process and painting. Painting is the act of laying on, or adorning with, paints or colors. *Webster's New International Dictionary,* second edition, 1956. That is not true here. Further, painting the terminals would not result in holding them in the desired spaced relationship as does the present process.

(5)

Item 807.00 does not forbid incorporation into new and different articles of commerce. What is precluded is loss by the terminals of their physical identity. The government concedes that has not happened here.

(6)

Firestone, supra, involved a different statutory provision and a different process, as explained in the opinion accompanying the judgment appealed from.

(7) (8) (9)

Our conclusion that the present process constitutes "assembly" under item 807 is not precluded by the circumstance that the terminals are not in physical contact with each other, but are held in pre-designed spacial relationship with each other. In light of our conclusion, also, we need not reach the arguments that molding is not incidental to assembly and that incorporation of the header into a relay makes formation of the header a fabrication of the terminals.

AFFIRMED

LOWA, LTD., APPELLANT *v.* UNITED STATES, APPELLEE

Appeal No. 83-1018

724 F.2d 121

(Decided January 4, 1984)

Andrew P. Vance, of New York, New York, submitted for appellant. With him on the brief were *Leonard Lehman, John J. Galvin, John E. Corette III,* and *Daniel Webster,* of Washington, D.C., of counsel.

J. Paul McGrath, Assistant Attorney General, *David M. Cohen,* Director, *Joseph I. Liebman,* Attorney in Charge International Trade Field Office and *Barbara M. Epstein,* of New York, New York submitted for appellee.

Appealed from: U.S. Court of International Trade.
Chief Judge RE.

Before MARKEY, *Chief Judge*, BENNETT, *Circuit Judge* and COWEN, *Senior Circuit Judge*.

MARKEY, *Chief Judge*.

Appeal from a judgment of the United States Court of International Trade (CIT) dismissing for lack of jurisdiction. We affirm.

OPINION

The judgment appealed from is *affirmed* on the basis of the opinion filed by the CIT. *Lowa, Ltd.* v. *United States*, 561 F. Supp. 44, (Ct. Int'l Trade 1983).

AFFIRMED

ROHM & HAAS COMPANY, APPELLANT *v.* UNITED STATES, APPELLEE

Appeal No. 83-1177

727 F.2d 1095

(Decided February 9, 1984)

William D. Outman, II, of Washington, D.C., argued for appellant. With him on the brief were *Albert J. Bartosic* and *Munford Page Hall, II*.

John J. Mahon, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath*, Assistant Attorney General *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge LANDIS.

Before FRIEDMAN, RICH, and SMITH, *Circuit Judges*.

FRIEDMAN, *Circuit Judge*.

This is an appeal from a decision of the Court of International Trade sustaining the classification of the imported merchandise by the District Director of Customs at the Port of New York. We affirm.

I

The issue in this case is the proper classification for Customs purposes of sheets of acrylic resin imported from Taiwan. The Customs Service classified the merchandise under item 771.41 of the Tariff Schedules of the United States as "flexible" plastic sheets and admitted them duty-free under the General System of Preferences as products from Taiwan. *See* 19 U.S.C. § 2461-2465 (1982); 19 U.S.C. § 1202 (1982) (General Headnote 3(c) to the Tariff Schedules).

The appellant, which manufactures a similar product which it sells in the United States under the trademark "Plexiglas," filed with the Customs Service pursuant to 19 U.S.C. § 1516 (1982) a petition challenging that classification. The appellant contended that the merchandise should have been classified as "sheets * * * of acrylic resin" "other" than "flexible" under item 771.45, and subjected to the duty prescribed for that item. The Customs Service denied the petition and appellant filed the present suit in the Court of International Trade to set aside that determination.

After a trial, the Court of International Trade sustained the classification. The court followed the prior decision of the Customs Court in *Sekisui Products, Inc.* v. *United States*, 63 Cust. Ct. 123 (1969), which held that the common meaning of "flexible" in item 771.42 (the forerunner of item 771.41) is the dictionary definition: "capable of being flexed: capable of being turned, bowed, or twisted without breaking. * * * Flexible is applicable to anything capable of being bent, turned, or twisted without being broken and with or without returning of itself to its former shape."

The Court of International Trade held that "Congress has chosen not to amend the law to define 'flexible' in a commercial designation even though made specifically aware of the *Sekisui* decision and its ramifications." It ruled that the appellant "failed to prove that the term 'flexible' has a commercial designation based on a trade understanding of the term 'flexible' which differs from its common meaning and is not in conflict with clearly manifested legislative intent." The court concluded that the appellant "has failed to demonstrate a contrary legislative intent other than the common meaning of the term 'flexible' [and] has also failed to show through plenary proof a definite, general and uniform commercial designation."

II

A. "The meaning of a tariff term is presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary." *Bentkamp v. United States*, 40 CCPA 70, 78 (1952), *quoted with approval in United States v. C. J. Tower & Sons*, 48 CCPA 87, 89 (1961). One who argues that a term in the tariff laws should not be given its common or dictionary meaning must prove that "there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade." *Moscahlades Bros. v. United States*, 42 CCPA 78, 82 (1954). The concept of commercial designation "was intended to apply to cases where the trade designation is so universal and well understood that the Congress, and all the trade, are supposed to have been fully acquainted with the practice at the time the law was enacted." *Jas. Akeroyd & Co. v. United States*, 15 Ct. Cust. App. 440, 443 (1928). "Proof of commercial designation is a question of fact to be established in each case." *S.G.B. Steel Scaffolding & Shoring Co. v. United States*, 82 Cust. Ct. 197, 206 (1979) (and cases there cited).

As noted, the Court of International Trade ruled that the appellant had not proved that "the term 'flexible' has a commercial designation based on a trade understanding of the term 'flexible' which differs from its common meaning * * *." Based upon our review of the record in light of the principles governing the determination of commercial meaning set forth above, we cannot reject that finding as clearly erroneous.

The appellant's expert witness, Reinhart, whom the court described as "possess[ing] excellent qualifications indicating a lifelong career devoted to researching and evaluation plastic materials," had been the chairman of a subgroup at the American Society for Testing and Materials, an organization Reinhart called "the largest and probably the most influential standardization body in the whole world." His subgroup attempted for two or three years to formulate a definition of "flexible," but the endeavor was unsuccessful "because there was not enough agreement to reach a definition." Instead, the subgroup used and defined the terms "rigid," "semirigid," and "nonrigid." Reinhart also testified that although the dictionary definition of "flexible" was "not the same in the plastic industry," he knew people in that industry who have said it is the same.

The appellant introduced evidence that the kind of acrylic sheet here involved was marketed or described in sales and promotional literature not as flexible, but as rigid. That evidence, however, did not affirmatively establish a commercial meaning of flexible that differs from the dictionary definition.

In a recent case in which it was contended that the tariff items "clasps" and "sew-on fasteners" had commercial meanings different from their common meanings, we held that the appellant had "failed to establish commercial designations for those terms which are 'definite, uniform and general' throughout the United States. The opinion of [appellant's] witnesses, that the fasteners are not known as clasps or sew-on fasteners in the garment trade, is not conclusive proof of the required commercial meanings * * *." *Bar Zel Expediters, Inc. v. United States*, 698 F.2d 1210, 1212, (Fed. Cir. 1983). That principle applies equally in this case. The doctrine of commercial meaning reflects an assumed congressional intent to adopt for Customs purposes the accepted industry meaning of a term. A showing that the industry routinely uses the negative or opposite of the term is not sufficient to establish that Congress adopted the industry's view that a particular product is to be classified under a particular item.

Although the Court of International Trade did not explicitly find that the acrylic sheet here involved was flexible under the ordinary or dictionary meaning of that term, that determination was implicit in its decision upholding the classification. The court pointed out that the government's witness had observed two men at the importer's office flex a sheet of acrylic so that the ends touched without breaking the sheet, and that in a demonstration at the trial the witness, together with the appellant's counsel, had been able to bend acrylic sheets "to a great degree without breaking."

B. The appellant argues that the legislative history of the tariff provision at issue shows that Congress intended acrylic sheet to be classified under item 771.45 as "other" than "flexible." The argument is somewhat intricate, but there is no need to explicate it here. The legislative history of the Act of November 8, 1977, Pub. L. No. 95-160, 91 Stat. 1271 (amending the Tariff Schedules), shows that Congress recognized that acrylic sheet might be classified as either flexible or nonflexible.

The Senate committee report stated: "Imports of flexible sheets of acrylic resin are now dutiable under TSUS item 771.42 [now 771.41] * * *. Imports of nonflexible sheets of acrylic resin are now dutiable under TSUS item 771.45 * * *." S. Rep. No. 419, 95th Cong., 1st Sess. 3-4, *reprinted in* 1977 U.S. Code Cong. & Ad. News 3369, 3371. Since in the 1977 amendment Congress made no change in the tariff provisions here involved, the inference is compelling that Congress intended that acrylic sheet could be classified either as "flexible" or as "other" than flexible (*i.e.*, nonflexible).

The legislative history contains an additional indication that Congress viewed the term "flexible" in these tariff items as carrying its common or dictionary meaning. In 1977 the chairman of the House subcommittee requested that "in order to clarify the dutiable status of acrylic sheets," the Customs Service give the committee "an explanation of our practice with respect to the term 'flexibility' as it applies to acrylic sheets classifiable under item 771.42." Letter from G.R. Dickerson to Representative Charles A. Vanik (July 13, 1977). In response, the Acting Commissioner of Customs stated that the agency's practice "is guided by" the *Sekisui* case. He then stated:

> The court's test is exceptionally broad and has caused some administrative difficulty. Further, it appears that as a result of the court's decision some merchandise is being treated as flexible for tariff purposes which was not so regarded by the framers of the tariff schedules.
>
> A quantitiative [sic] test, based on the modulus of elasticity in flexure would be easier to administer and lead to more consistent results.

Id. The "modulus of elasticity in flexure" test—under which these acrylic sheets would be classified as "other" than "flexible"—is the one the appellant urges as the proper basis for determining flexibility *vel non.*

Congress, however, made no change in these items, although it did change other parts of the tariff schedules. This failure to take any action in response to the government's suggestion that a change from the dictionary meaning in *Sekisui* would be appropriate, at least suggests that the Congress acquiesced in the *Sekisui* interpretation of the term "flexible."

The decision of the Court of International Trade is *affirmed*.

AFFIRMED

Nichimen Co., Inc., appellant *v.* United States, appellee

Appeal No. 83-1067

726 F.2d 1580

(Decided February 14, 1984)

Urban S. Mulvihill, of New York, New York, argued for appellant.

Saul Davis, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge Newman.

Before Davis, Baldwin and Kashiwa, *Circuit Judges*.

Baldwin, *Circuit Judge*.

This appeal is from a judgment of the United States Court of International Trade which sustained the separate classification of radio receiver chassis under item 685.24 TSUS and of tape players as machines, not specifically provided for (n.s.p.f.) under item 678.50. 565 F.Supp. 148 (Ct. Int'l Trade 1983). After a thorough consideration of appellant's arguments, we fully agree with the opinion of the Court of International Trade, filed by Judge Newman, and we affirm on the basis of that opinion.

Appellant's position is that the items in question should be classified as an entirety which would be eligible for duty-free treatment. The thrust of appellant's argument is that the chassis/tape combination is an entirety because the tariff description is for a machine n.s.p.f., and all the parts necessary to constitute a machine n.s.p.f. are present upon entry. Appellant's position cannot be maintained.

Judge Newman correctly summarized the law of the doctrine of entireties as set forth in *Stella D'Oro Biscuit Co., Inc.* v. *United States*, 65 CCPA 52, C.A.D. 1205, 570 F.2d 945 (1978), *aff'g*, *Stella D'Oro Biscuit Co., Inc.* v. *United States*, 79 Cust. Ct. 28, C.D. 4709, 436 F.Supp. 398 (1977) and *United States* v. *Baldt Anchor, Chain and Forge Div. of Boston Metals Co.*, 59 CCPA 122, C.A.D. 1051, 459 F.2d 1403 (1972):

> It is now well settled that separate components covered by the same entry, although designed and intended to be used together, are not properly classifiable as an entirety where the components do not comprise a complete commercial entity, but

> instead must be assembled with additional components to form a complete article of commerce. [565 F.Supp. at 151.]

Judge Newman found that the imported chassis and tape players were not sold by appellant in combination as complete commercial articles. Instead, the chassis and tape players were separately inventoried and used solely as parts along with other components in the production of various models of appellant's consoles and compacts. We find no clear error in these findings of fact. *Daw Industries, Inc.* v. *The United States*, 714 F.2d 1140 (Fed. Cir. 1983). We therefore agree with Judge Newman's conclusion that the chassis and tape players were separate tariff entities rather than entireties. We also agree that appellant's argument that the classification was inconsistent with prior administrative practice was not supported by the proffered testimony.

For the foregoing reasons, the judgment of the Court of International Trade is *affirmed*.

AFFIRMED

AMERSHAM CORPORATION, APPELLANT v. UNITED STATES, APPELLEE

Appeal No. 83-956

728 F.2d 1453

(Decided March 2, 1984)

Lynn S. Baker, of Chicago, Illinois, argued for appellant. With her on the brief was *Robert E. Burke*.

Joseph I. Liebman, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, and *David M. Cohen*, Director.

Appealed from: U.S. Court of International Trade.
Chief Judge RE.

Before FRIEDMAN, SMITH, and NIES, *Circuit Judges*.

SMITH, *Circuit Judge*.

In this customs classification case appellant, Amersham Corporation (Amersham), appeals from a judgment of the United States Court of International Trade rejecting the United States Customs Service's initial classification of certain radioactive foil disks used in smoke detectors, rejecting Amersham's preferred classification of the product, but accepting Amersham's alternative classification. We affirm.

ISSUE

The sole issue before this court is whether certain imported radioactive foil disks (disks) are properly classified, as Amersham contends, under Tariff Schedules of the United States (TSUS)[1] 494.50, usefully radioactive chemical compounds,[2] having a zero duty, or, as the United States (Government) contends, and Amersham alternatively contended below, under 685.70, fire alarms and parts thereof, having a 4 percent ad valorem duty.

BACKGROUND

A summary description of the facts material to this appeal is:[3] Amersham imports a product described as "americium 241 alpha foil disk," consisting of americium oxide measuring one microcurie encapsulated in a foil capsule of a gold-palladium face with a silver backing (foil). Americium oxide is a compound composed of the elements americium and oxygen; americium 241 is an isotope of the element americium. Americium oxide is highly radioactive and must be encapsulated to allow safe emission of the radiation. The disks as imported are primarily designed and almost exclusively used in ionization-type smoke detectors.

The Customs Service initially classified the disks under 709.66 at 6 percent duty; Amersham contested and the trial court rejected this classification, accepting Amersham's fall-back classification under 685.70 at 4 percent but rejecting Amersham's first-choice classification under the duty-free 494.50. Amersham appeals the trial court's judgment, seeking reversal regarding classification under 685.70 and classification instead under 494.50; the Government requests this court to affirm the trial court's classification of the disks under 685.70. Neither side appeals the trial court's rejection of Customs' initial classification of the disks under 709.66.

OPINION

In our independent review of the contested issue of law (classification) herein, we keep in mind that Amersham bears the burden of proof to establish that its claim is correct. 28 U.S.C. § 2639(a) (Supp. V 1981).

Amersham's contention that the disks fall under duty free 494.50, usefully radioactive chemical compounds, may be viewed under two theories. The first, which the trial court analyzed in detail, focuses on whether the disks are "compounds" which are usefully radioactive. The second, whether the disks may be viewed as compounds in a usual container (the foil), was only tangentially discussed below.[4] We discuss these in turn, focusing upon the latter theory.

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[1] *See* 19 U.S.C. § 1202 (Supp. V 1981)

[2] *See* Chief Judge Re's opinion below for complete description of relevant TSUS numbers. *Amersham Corp.* v. *United States*, 564 F. Supp. 813, 814-15 (CIT 1983).

[3] A complete description of the facts is set forth in *Amersham*, 564 F. Supp. at 813.

[4] The Government argues that Amersham's "usual container" claim is a new one not raised before the trial court and hence not to be considered by this court. We disagree. While the issue was not so refined and honed as it is here on appeal, it was at least mentioned below (*e.g.*, plaintiff's reply brief at 12-13) and was addressed implicitly in Chief Judge Re's opinion. *Amersham*, 564 F. Supp. at 817.

Expert testimony has established and the parties agree that americium oxide is a "compound" as defined in schedule 4, headnote 2(a) of the tariff schedules,[5] but that, since the gold-palladium and silver foil does not bond with the americium oxide, the alpha foil disk itself is not a "compound" as so defined.[6] Chief Judge Re found this fact conclusive in his rejection of Amersham's primary claim, despite Amersham's argument that, although the disk technically may not be a compound, it must be so constructed in order for the true compound sandwiched inside, the americium oxide, to be usefully radioactive. We affirm Chief Judge Re's discussion and holding on this theory.[7]

Alternatively, Amersham urges before this court a second manner of viewing the alpha foil disks: as tiny parcels of the compound americium oxide, by itself harmfully radioactive but which when packaged in the usual or ordinary containers for such a compound—*i.e.*, the foil—is usefully radioactive. This theory involves two subissues: (1) whether the foil is indeed a "usual or ordinary" container; [8] and, (2) whether, if it is, the compound inside the container is "usefully radioactive." Because we hold against Amersham on the first subissue, we do not reach the second.

In urging that the foil is a usual container, Amersham stresses that the foil is not designed for, or capable of, reuse; it serves as a standard device for transporting the radioactive americium oxide; it is sold with the americium oxide at retail; and it remains with the compound throughout its commercial use in the smoke detector, enabling the compound to perform its function of emitting radiation in a useful manner. While Amersham cites a number of container cases and a Customs ruling in support of its position,[9] we find persuasive in this highly fact-specific area the case of *Bruce Duncan Co.* v. *United States,* 63 Cust. Ct. 412, C.D. 3927 (1969). In *Bruce Duncan* the importer contended that metal cartridges filled with butane were usual containers for the duty-free butane and were not parts of cigarette lighters. As with the special foil here, the metal cartridges were not designed for or capable of reuse; they served as the standard device for transporting the flammable butane; they were sold with the butane and remained with it throughout its commercial use in the cigarette lighter. Nevertheless the Customs Court held:

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[5] *See id.* at 815 for pertinent text of headnote.

[6] *Id.* at 816.

[7] *Id.* at 814-21.

[8] As defined in TSUS General Headnote 6(b)(i):

"(i) The usual or ordinary types of shipping or transportation containers or holders, if not designed for, or capable of, reuse, and containers of usual types ordinarily sold at retail with their contents, are not subject to treatment as imported articles. Their cost, however, is * * * a part of the value of their contents and if their contents are subject to an ad valorem rate of duty such containers or holders are, in effect, dutiable at the same rate as their contents * * *."

[9] *E.g.*, *United States* v. *Hohner*, 4 Ct. Cust. App. 122, T.D. 33,393 (1913); *R. J. Saunders & Co.* v. *United States*, 69 Cust. Ct. 151, C.D. 4387 (1972); *Fontana Hollywood Corp.* v. *United States*, 64 Cust. Ct. 204, C.D. 3981 (1970); *Spesco Corp.* v. *United States*, 62 Cust. Ct. 297, C.D. 3749 (1969). This court has considered the container problem as it regards reuse in *Holly Stores, Inc.* v. *United States*, 697 F.2d 1387 (Fed. Cir. 1982). Amersham also cites a 1969 Customs ruling, Treas. Dec. 69-77(17), ORR Ruling 200-69, concerning encapsulated radium-beryllium neutron sources having many uses, whereas the subject disks are manufactured precisely for smoke detector use. *Amersham*, 564 F. Supp. at 817.

> While it seems clear from the record that the cartridges are containers for butane, they are not the "usual" containers which General Headnote 6(b) (i) and (ii) envisions. It is apparent that the primary function of the cartridge is as a part of a cigarette lighter. * * *

Bruce Duncan, 63 Cust. Ct. at 415.[10]

The same is true here. Just as the metal cartridges were designed precisely to fit into the cigarette lighters, the alpha foil disks "are primarily designed and almost exclusively used by its [Amersham's] customers, as parts of smoke detectors."[11] We therefore hold that Amersham has failed to bear its burden of proving the correctness of classifying the alpha foil disks under 494.50, using a "usual container" theory, and reaffirm the trial court's holding that the disks must be considered as parts of fire alarms under 685.70. In this context we do not reach, though are mindful of, Amersham's contentions that such a holding is contrary to congressional intent in enacting 494.50 and creates an anomaly in that it practically reads that TSUS item and the concept of "usefully radioactive" out of existence. The trial court has thoroughly analyzed these arguments below.[12]

CONCLUSION

Having considered the question of law (classification) here presented, we hold that Amersham has failed to sustain its burden of proving the correctness of its primary claim and we *affirm* the judgment below.

AFFIRMED

MM&P Maritime Advancement, Training, Education & Safety Program (MATES) and Maritime Institute of Technology & Graduate Studies, appellants *v.* Department of Commerce, International Trade Administration, appellee

Appeal No. 83-1130

729 F.2d 748

(Decided March 5, 1984)

Eugene T. Rossides, of Washington, D.C., argued for appellants. *Robert V. McIntyre* and *George C. Smith,* of Washington, D.C., were on the brief for appellant.

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[10] *See also Morris Friedman & Co.* v. *United States,* 56 Cust. Ct. 21, C.D. 2607 (1965).

[11] *Amersham,* 564 F. Supp. at 821. We do not repeat here the findings of fact which led Chief Judge Re to this conclusion. *Id.* at 820-22.

[12] *Id.* at 814-21.

Velta A. Melnbrencis, of Washington, D.C., argued for appellee. With her on the brief were *J. Paul McGrath*, Assistant Attorney General and *David M. Cohen*, Director.

Appealed from: U.S. Department of Commerce, International Trade Administration.

Before Rich, *Circuit Judge*, Skelton, *Senior Circuit Judge*, and Kashiwa, *Circuit Judge*.

Kashiwa, *Circuit Judge*.

This is an appeal from the decision of the Secretary of Commerce denying appellants' application for duty-free entry of two shiphandling and navigational simulators pursuant to Item 851.60 Tariff Schedules of the United States (TSUS), added by section 6 of the Educational, Scientific and Cultural Materials Importation Act of 1966.[1] The Secretary denied appellant's application based on his determination that the simulators were not intended to be used in scientific research or formal science-oriented education. We reverse and remand.

I

The Educational, Scientific, and Cultural Materials Importation Act of 1966 (hereinafter the Act) was enacted to implement the Florence Agreement, an international treaty designed to facilitate the free flow of educational, scientific, and cultural materials across national boundaries. S. Rep. No. 1678, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. CODE CONG. 4 AD. NEWS 3253, 3254; H.R. Rep. No. 1779, 89th Cong., 2nd Sess. 6 (1966). (Hereinafter S. Rep. No. 1678 and H.R. No. 1779). The Act accomplishes this purpose by providing for the duty-free importation of educational, scientific, and cultural materials if certain requirements are met. The provision of the Act at issue in this case provides for duty-free entry of:

> Articles entered for the use of any nonprofit institution, whether public or private, established for educational or scientific purposes:
>
> Instruments and apparatus, if no instrument or apparatus of equivalent scientific value for the purposes for which the instrument or apparatus is intended to be used is being manufactured in the United States (see headnote 6 to this part). [19 U.S.C. § 1202, Schedule 8, Part 4, Item 851.60, of the Tariff Schedules of the United States (TSUS)].

The Act further provides that the Secretary of Commerce shall have responsibility for determining whether an instrument or apparatus of equivalent scientific value to such article, for the purposes for which the instrument or apparatus is intended to be used, is being manufactured in the United States. Headnote 6 to TSUS Schedule 8, part 4.

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[1] Pub. L. No. 89-651, § 6(c), 80 Stat. 897, 899, 19 U.S.C. § 1202, Schedule 8, Part 4, Headnote 6.

Appellant, the Masters, Mates and Pilots Maritime Advancement, Training, Education and Safety Program (MATES), is a nonprofit institution which administers the Maritime Institute of Technology and Graduate Studies and which conducts educational and training programs in the field of marine navigation, shiphandling and related fields. These programs are designed to further the education and training of pilots, shipmasters and other licensed deck officers.

On May 8, 1981, MATES filed its initial application for duty-free entry under the Act of a "shiphandling simulator for shiphandling and navigation training" to be used in a shiphandling course. According to the curriculum included in the application, each student was to spend 50% of his time in the classroom and 50% of his time in the simulator. The purpose of the course was to: (1) Improve the ability of the merchant officer to plan and execute safe and effective ship operations in the context of realistic situations, (2) cultivate a thorough understanding of the internal and external forces on a ship during navigation, and (3) provide a basis for standard bridge team organization.

Students taking the course were required to understand navigation and radar assessment procedures, the effects of hydrodynamics on ship performance, and the equations of motion which form the basis for physical phenomena affecting ship motion. Unless a student had taken courses in all-weather and electronic navigation during the prior two years, he would have to take a refresher course in these areas before enrolling in the course. The application also specified the technical features of the simulator which were necessary to achieve appellants' educational objectives.

On January 5, 1982, MATES filed a request for a second "Shiphandling simulator for shiphandling and navigation training", again indicating that the article was intended to be used for educational purposes.

On January 16, 1982, MATES' requests were both denied without prejudice for resubmission. The letter of denial stated:

> (To) permit the determination of scientific equivalency required by Pub. L. 89–651, the application must show a use of the foreign article in scientific research or formal science-oriented education (e.g., courses in chemistry, physics, biology, etc.).
>
> The Department concurs with NBS and notes that your purposes appear to be vocational training which cannot be considered scientific research or science oriented education. Thus at this time we are unable to attach any measure of scientific value to the foreign article and therefore find that a prima facie case for a determination relative to scientific equivalency has not been made.

On April 23, 1982, MATES resubmitted its request for duty-free entry with regard to the first article specifying it as a "radio and radar navigational aid apparatus identified as a Ship Operational Research and Educational Facility." The application stated that, although the article would be principally used for educational purposes, it was also capable of various research applications.[2] A similar application was resubmitted for the second article on January 6, 1983.

On April 19, 1983, the Director of the Office of Import Programs issued his decision denying duty-free treatment in both cases upon the ground that "because the article possesses no scientific value for the purposes for which it is intended, a prima facie case is not presented upon which to base a finding of scientific equivalency." [3] The decision stated that to qualify for duty-free treatment, an applicant must show that it intends to use the foreign article in either scientific research or formal science-oriented education. This conclusion was based on the statutory requirement that an article may be imported duty-free if no instrument or apparatus of equivalent scientific value for the purposes for which it is intended to be used is being manufactured in the United States. The Director reasoned that "unless an applicant actually intends that an article will be used by an institution 'established for educational or scientific purposes' in a manner which has some scientific value within the context of its intended use, the required scientific equivalency determination would be meaningless."

Because MATES intended to use the simulators in what the Secretary concluded was a purely vocational activity, the application was denied.

II

The Secretary of Commerce has interpreted the statute as permitting duty-free entry only for articles intended to be used for scientific research or formal science-oriented education.[4] Under the statute this court has jurisdiction to review questions of law which includes the determination whether the agency's factual findings are supported by substantial evidence. *University of North Carolina* v. *Department of Commerce,* 701 F.2d 942 (Fed. Cir. 1983). Our examination of the statutory language and legislative history convinces us that the Secretary's determination that the article must be used for scientific research or formal science-oriented education has no basis in the law, *Train* v. *Natural Resources Defense Coun-*

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[2] The Department determined that appellant's resubmission did not comport with the regulatory requirements. Appellant does not challenge this determination. We, therefore, decide only whether appellant's initial application was improperly denied.

[3] The Secretary of Commerce has delegated his authority over this matter to the Director of the Office of Import Programs. 15 CFR 301.1(a); 38 Fed. Reg. 9,324 (1973).

[4] The current regulations which became effective July 28, 1982 provide in § 301.5(d)(iii) that the applicant's intended purposes must include either "scientific research or science-related educational programs." 47 Fed. Reg. 32517, 32520 (1982). Appellant contends that the standard expressed in the new regulations is different from the standard applied in the instant case. The government contends that the new regulation imposes no different standard from that applied in the instant case and that applied in the past. We need not and do not resolve this issue because the new regulations were not in effect at the time appellant's application was denied.

sel, 421 U.S. 60 (1975), and that this standard has been arbitrarily applied to appellant in this case, 5 U.S.C. § 706.

According to the language of the statute, an article is entitled to duty-free entry: (1) If it is entered for use by any nonprofit institution established for scientific or educational purposes, and (2) no instrument or apparatus of equivalent scientific value for the purposes for which it is intended to be used is being manufactured in the United States.

The Secretary's determination that foreign instruments and apparatus are permitted duty-free entry only if they are intended to be used for scientific research or formal science-oriented education, and, therefore, not for vocational training, is based on his interpretation that use of the foreign article must have some scientific value. This interpretation is in turn based on the "equivalent scientific value" determination which the Secretary is required to make.

We agree with the government that according to the legislative history, the equivalent scientific value determination is the most important test for determining duty-free entry of a foreign article. S. Rep. No. 1678 at 3265; H.R. Rep. No. 1779 at 18. We also agree with the government that according to the statute, the Secretary must make this determination in the context of intended use of the foreign article.

We do not agree, however, that because of this requirement, it is reasonable to conclude that the foreign article must be used in scientific research or in formal science-oriented education. What the Secretary has done in this case is to graft onto the stated purposes for which the instrument can be used, educational or scientific research, the additional requirement that the educational purpose must be a formal science-oriented one (undefined) and to conclude that appellant's vocational purposes disqualify the simulators from duty-free entry under the Act.

The government makes a two-step argument to support this position. First, it argues that because the scientific equivalency determination must be made in the context of the instrument's intended use, the foreign article must have a scientific purpose. Then the government contends that the Secretary's consistent interpretation of the statutory scheme that the instrument must be intended to be used in scientific research or in formal science-oriented education is reasonable in light of the scientific purpose requirement.

The government contends that because classification of imports as scientific instruments has depended upon their use and since Congress has conditioned duty-free entry under item 851.60 upon an intended use with a scientific value, it is obvious that only foreign instruments intended to be used for scientific purposes qualify for duty-free treatment under 851.60. It also contends that any other interpretation would render the scientific equivalency determination meaningless. We disagree.

The statute states that duty-free entry will be permitted for:

> Articles entered for the use of any nonprofit institution, whether public or private, established for educational or scientific purposes.

The government contends that educational or scientific merely refers to the type of institution which can import articles duty-free. However, the plain language of the statute states "for educational or scientific purposes." Moreover, Annex D to the Florence Agreement, which the provision in issue implements, explicitly states that duty-free entry is to be provided for "scientific instruments or apparatus, intended exclusively for *educational purposes or* pure scientific research." [5] (Emphasis added.)

The legislative history of the Act also indicates that Congress intended the statute to apply to articles imported for educational purposes, as well as for scientific research. As was stated in the Senate Report which accompanied the legislation:

> In short, instruments or apparatus of types not domestically produced would be admitted free of duty if imported by a qualified nonprofit institution for use exclusively in its noncommercial scientific *or educational* pursuits. S. Rep. No. 1678, at 3265; H.R. No. 1779 at 18. [Emphasis added.]

The legislative history also makes clear that the scientific equivalency determination is not intended to limit the purposes of the institution but rather is concerned with the performance characteristics of the imported article. As was stated in a letter from the Secretary of State to the House Ways and Means Committee in describing the scientific equivalency evaluation:

> As a general rule the articles would be compared on the basis of total overall performance. However, they would be compared where pertinent on the basis of specific differences between them. Evaluations of equivalency between domestic and foreign instruments or apparatus will be based on the structural and operational characteristics that are relevant to the functions which an article, such as that for which duty-free treatment is sought, is designed to perform. One article shall be considered equivalent to another, if there are no significant differences between them with respect to the pertinent characteristics. *Implementation of Florence and Beirut Agreements: Hearings on H.R. 8664 and H.R. 15271 before the Committee on Ways and Means*, 89th Cong. 1st Sess. 9, 12–13.

The reason why the scientific equivalency determination is to be made in the context of the article's intended use is so that foreign instruments which can satisfy the institution's requirements will not be admitted duty-free if there is a domestic article which can also satisfy the institution's needs:

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[5] The text of Annex D reads:

ANNEX D

SCIENTIFIC INSTRUMENTS OR APPARATUS

Scientific instruments or apparatus, intended exclusively for educational purposes or pure scientific research, provided:

(a) That such scientific instruments or apparatus are consigned to public or private scientific or educational institutional [sic] approved by the competent authorities of the importing country for the purpose of duty-free entry of these types of articles, and used under the control and responsibility of these institutions;

(b) That instruments or apparatus of equivalent scientific value are not being manufactured in the country of importation.

> Under the bill the determination of equivalent scientific value is to be in terms of equivalent scientific value for the purposes for which the instrument or apparatus is intended to be used. This will prevent the bill from resulting in the duty-free entry of an instrument or apparatus in a case where there is available a domestic article which, though different from the article in some scientific characteristics, nevertheless is as capable as is the foreign one of fulfilling the purposes for which the instrument or apparatus is intended to be used. S. Rep. No. 1678 at 3265.

Nowhere does the statute or the legislative history indicate that because the Secretary is required to ascertain whether there is a domestic article of equivalent scientific value to the foreign article and because the Secretary must make this determination in the context of intended use of the article, that use of the article must be for purely scientific purposes, or, as stated by the Secretary, for scientific research or formal science-oriented education. According to the statute's language and the legislative history, the institution may use the instrument or apparatus for scientific research *or* for its educational pursuits.

Although we agree with the government that in order for the Secretary to make his scientific equivalency determination the article must have some "scientific value" for its intended use, we, however, do not agree that this means that the article must be used in formal science-oriented education. We also do not agree that an article imported for use in vocational training is excluded from the benefits of the Act. There is nothing in the statutory language or the legislative history to support the Secretary's position and it directly contravenes the broad purposes of the Act which is designed to foster the free flow of educational and scientific materials across national borders. This court is not bound by an administrative agency interpretation which does not comport with Congressional intent, *United States* v. *Sumitomo Shoji*, 534 F.2d 320 (CCPA 1976).

III

The government also contends that the requirement that use of the article must be for scientific research or formal science-oriented education is a reasonable interpretation of the statute because Congress has failed to define the term "scientific," scientific is a very broad term, and the Secretary has consistently interpreted the term scientific as requiring that a particular foreign article be used in scientific research or formal science-oriented education. What the Department means by formal science-oriented education was stated in its first rejection of MATES' application:

> To permit the determination of scientific equivalency required by Pub. L 89–651, the application must show use of the foreign article in scientific research or formal science-oriented education (e.g., courses in chemistry, physics, biology etc.).

The Secretary, however has not consistently interpreted the statute as requiring that the article must be used in formal science-oriented education and, therefore, that vocational training in a scientific field is a precluded use under theror statute. This is a new requirement abritrarily imposed on MATES in this case.

During 1968–1971, several vocational and public schools were permitted to import duty-free certain Theory of Electricity Kits which were used for teaching the basic theory of electricity by having students construct electrical articles.[6] The government attempts to distinguish these cases on the basis that a vocational training school can also teach science-related courses in addition to pure vocational training. However, there was no suggestion in these cases that the imported devices failed to qualify under the statute because these vocational training programs did not constitute "formal science-oriented education." Moreover, in its decision in the instant case, the Department stated:

> We, of course, considered teaching the underlying theory of electricity a scientific educational purpose, even though such training was being given in vocational schools or community colleges. *If the Department erred in an earlier case, involving a theory of electricity device, which we do believe was the case, we are not obligated to perpetuate the error.* [Emphasis added.]

Further, in the series of cases cited by the government in which the Secretary denied the duty-free importation of foreign articles used in vocational training, there was no indication that the foreign article had to be used in formal science-oriented education.[7] In those decisions, the Secretary stated time and again that some scientific use of the article, whether educational or research, must be intended. The Department did not state that the article must be used in formal science-oriented education, and in most of these cases there was no suggestion that the foreign article was to be used in a scientific field.[8] We agree with the government that the

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[6] *I.B.E.W. Electrical Workers Educational Training Centre*, 33 Fed. Reg. 10659 (1968); *Occupational Centre (Belmont, N.Y.)*, 36 Fed. Reg. 19450 (1971); *Hawaii Technical School*, 34 Fed Reg. 8171 (1969); *Downey Unified School District*, 33 Fed. Reg. 15665 (1968); *Rio Hundan Junior College*, 33 Fed. Reg. 15587 (1968).

[7] *South Shore Vocational Technical High School*, 32 Fed. Reg. 8184 (1965) (article designed to perform operations on sheet metal); *Los Angeles County Museum of Art*, 33 Fed. Reg. 2573 (1968) (device for restoration of paintings); *New York Institute of Technology*, 36 Fed. Reg. 2636 (1971) (perspective drawing), *Texas A & M University*, 36 Fed. Reg. 1923 (1971) (profile milling machine); *The Catholic University of America*, 37 Fed. Reg. 43529 (1975); (Music Synthesizer) Students International Meditation Society, 40 Fed. Reg. 43529 (1975) (videotape prompter); *Maine Maritime Academy*, 44 Fed. Reg. 16366 (1982) (marine diesel propulsion simulator); *Maritime Institute of Technology*, 48 Fed. Reg. 17637 (1982) (Deviascope to be used in a training course for obtaining U.S. Coast Guard mariner's license), 48 Fed. Reg. 17636 (1982) (radio navigation simulator).

[8] The government cites only three cases which arguably concerned vocational training in a scientific field. Two of these cases involved appellant, *Maritime Institute of Technology*, 48 Fed. Reg. 17636 and 17637 (1982). The third case was an application for a marine diesel propulsion simulator intended to be used in an undergraduate engineering curriculum in Modern Diesel Operations, *Maine Maritime Academy*, 47 Fed. Reg. 16366 (1982). We note that while the Secretary did state that the article must be used in scientific research or for science-related education, he did not use the formal science-oriented test imposed in the instant case.

Secretary has consistently required that the article must have some scientific value or use in order to perform the scientific equivalency determination. We, however, do not agree that the Secretary has consistently required that the article must be used in formal-science oriented education in order to satisfy the requirements of the statute. We also do not agree that the Secretary has consistently ruled that articles used in vocational training are excluded from the benefits of the Act. An agency is obligated to follow precedent, and if it chooses to change, it must explain why. *See Greater Boston Television* v. *FCC,* 444 F.2d 841 (D.C. Cir. 1970).

The government's final contention is that appellant intends to use the simulators to teach an "art" and not a "science" and, therefore, that there was substantial evidence to support the Secretary's conclusion that the simulators possessed no scientific value for their intended use. However, as the government itself argues, "scientific" is a very broad term and we hold that for the purposes of this Act it includes the applied sciences such as navigation and aviation as well as the customary academic sciences such as physics, chemistry, and biology.[9]

It is basic customs law that terms used in the TSUS are to be given their common meaning absent some special circumstance calling for a more specialized meaning. *Trans-Atlantic Co.* v. *United States,* 471 F.2d 1397, 1398, (CCPA 1973). "A court, in determining common meaning, may rely upon its own understanding of terms used and may consult standard lexicographic and scientific authorities." 471 F.2d at 1398.

"Navigation" is defined in *Webster's Third New International Dictionary* (Unabridged Ed., 1966, p. 1509) as:

> "Navigation. 1. the act or practice of navigating. 2a. the *science* or art of conducting ships or aircraft from one place to another; esp: the method of determining position, course, and distance traveled over the surface of the earth by the principles of geometry and astronomy and by reference to devices (as radar beacons or instruments designed as aids). [Emphasis added.] [10]

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[9] The government cites a series of cases which it contends stand for the proposition that the Court of Customs and Patent Appeals has consistently held that the term "scientific instruments" refers only to those instruments used in the pure as distinguished from the applied sciences. *See, e.g. W.L. Conover* v. *United States,* 17 CCPA 324 (1929); *United States* v. *C.H. Stoelting Co.,* 21 CCPA 588 (1934); and *United States* v. *Adlanco Industrial Products Corp.,* 21 CCPA 249 (1933). What the government fails to point out is that these cases involved the court's interpretation of paragraph 360 of the Tariff Acts of 1922 and 1930; the court specifically limited its holding to that section; and the court reached its conclusion based on its perception of congressional intent for that particular Act. In the cases cited by the government, the court held that the general term "scientific instruments", as used in paragraph 360, referred only to those instruments used in the pure sciences because Congress also included in paragraph 360 a specific enumeration of instruments used in the applied sciences. The court reasoned that the term "scientific instruments" must refer only to instruments used in the pure sciences, else Congress would not have felt the need to specifically list instruments used in the applied sciences in the same paragraph. 17 CCPA at 327-8. It is clear that the cases cited by the government do not establish a general proposition that the term "scientific instruments" means only those instruments used in the pure sciences. Nor do the cases stand for the proposition that courts have consistently given the term "scientific instruments" a narrow interpretation. The cases only involve the court's interpretation of particular statutory language in a particular case. Moreover, none of the cases were concerned with the statute now before us, but only with classification of merchandise under competing provisions of the Tariff Act.

[10] Numerous books and scientific journals also define navigation and seamanship as a science. To cite just one example: "Navigation is the art and science of determining the position of a ship and of conducting a ship safely from one position to another. *Navigation and Operations/Fundamentals of Naval Science,* Vol. 3, p. 4 (Naval Institute Press, 1972.) (Cir. 1983).

The interpretation that navigation is a science for purposes of the Act is in keeping with the broad purposes of the Act and it is consistent with our decision in *University of North Carolina* v. *Department of Commerce,* 701 F.2d 942 (Fed. Cir. 1983), wherein we stressed that it is not up to the Secretary to make value judgments regarding the nature or value of an institution's programs.

The government argues that appellant did not apply for duty-free treatment for navigational instruments and that appellant did not intend to use the simulators to teach the "science" of navigation. Rather, the government contends that MATES intended to use the articles merely to improve the existing shiphandling skills of experienced and licensed ships officers which, the government argues, is not a science. We do not agree.

MATES applied for a "Shiphandling simulator for shiphandling and marine navigation training" and it was to be used in a course whose purposes were: (1) to teach students to plan and execute safe operations in realistic situations, (2) to develop a thorough understanding of the internal and external force effects on a ship during navigation, and (3) to provide a basis for standard bridge team organization. Unless a student had taken courses in all-weather navigation and electronic navigation prior to enrolling in the shiphandling course, he would have to take a refresher course which covered an in-depth review of radar and electronic navigation. Students taking the course were also required to understand the effects of hydrodynamics on ship performance and to understand the equations of motion which form the basis for physical phenomena affecting ship motion.

The government contends that the fact that the practical training may involve technical and sophisticated concepts in the fields of marine navigation, hydrodynamics, radar, and electronic navigation does not mean that these areas were to be taught in the simulator courses. However, it is clear that the simulators were intended to be used to teach the students how to apply this scientific knowledge.[11] Merely because the simulators were intended to teach students the practical application of scientific knowledge in a vocational training setting does not mean that they would not be serving an educational purpose in a scientific field.

Moreover, the Secretary did not deny appellant's application because the simulators were intended to be used to teach an "art" and not a "science". The Secretary denied appellant's application because vocational training did not comport with his conception of formal-science oriented education in such fields as biology, chemistry and physics. We hold, however, that vocational training in a scientific field does come within the Act and conclude that appellant's use of the simulators was to educate and train students in such a scientific field.

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[11] The Department's view on the meaning of "scientific" disregards the most elementary dictionary definitions of the word: "of, or relating to, or exhibiting the methods or principles of *science,*" which, in turn, is defined as: "*1a:* possession of knowledge as distinguished from ignorance or misunderstanding; *b:* knowledge attained through study or practice. *2a:* a department of systematized knowledge as an object of study (the—of theology); *b:* something (as a sport or technique) that may be studied or learned like systematized knowledge; *c:* one of the natural sciences. *3:* knowledge covering general truths or the operation of general laws esp. as obtained and tested through scientific method: *specif.* NATURAL SCIENCE. *4:* a system or method based on or purporting to be based upon scientific principles. *5 cap:* CHRISTIAN SCIENCE." [WEBSTER'S seventh New Collegiate dictionary.]

V

After determining that appellant's application did not present a prima facie case upon which to base a finding of scientific equivalency, the Secretary proceeded to address the issue of whether there was a domestic instrument of equivalent scientific value. However, because the Secretary determined that the instrument possessed no scientific value for its intended purposes, he addressed the scientific equivalency determination in the most cursory fashion. We therefore *reverse* the Secretary's determination that there was no prima facie case upon which to base a finding of scientific equivalency and *remand* the case to the Secretary so that he can perform a proper scientific equivalency evaluation in order to determine whether the simulators can be imported duty-free.

REVERSED AND REMANDED

U.S. STEEL CORPORATION, ET AL., APPELLANTS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, APPELLEES, AND COSIPA, ET AL., INTERVENORS

Appeal No. 84-639

730 F.2d 1465

(Decided March 23, 1984)

D.B. King, of Pittsburgh, Pennsylvania, argued for appellants. With him on the brief were *J.J. Mangan, C.D. Mallick, L. Ranney* and *P.J. Koening.*

David M. Cohen, of Washington, D.C., argued for appellee U.S. With him on the brief were *Richard K. Willard,* Acting Assistant Attorney General and *Francis J. Sailer.*

Michael H. Stein, of Washington, D.C., argued for appellee ITC. With him on the brief was *Michael P. Mabile.*

Christopher Dunn, of Washington. D.C., argued for intervenors COSIPA.

Griffin B. Bell, King & Spalding, of Atlanta, Georgia, argued for Corporate Counsel And The Corporations They Represent as Amicus Curiae. With him on the brief were *John C. Staton, Jr.* and *Scott A. Wisser.*

Nancy A. Nord, of Washington, D.C., was on the brief for Amicus Curiae American Corporate Counsel Association.

Pierre F. de Ravel d' Esclapon, of New York, New York, *Lewis E. Leibowitz,* of Washington, D.C., *Peter D. Suchman,* of Washington, D.C. and *Milo G. Coerper,* of

Washington, D.C., were on the brief for Amicus Curiae in support of appellees and intervenors.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

Before MARKEY, *Chief Judge*, NICHOLS, *Senior Circuit Judge*, and KASHIWA, *Circuit Judge*.

MARKEY, *Chief Judge*.

Interlocutory appeal on a certified question arising from a decision of the Court of International Trade (CIT) [1] denying U.S. Steel's (USS) corporate in-house counsel access to confidential information. We vacate and return.

BACKGROUND

In *Republic Steel Corp., supra*, note 1, an action involving a negative preliminary injury determination by the International Trade Commission (ITC), the CIT denied a motion for access by USS' in-house counsel to certain confidential information while granting access to counsel retained by other parties. Relying on an earlier decision in *U.S. Steel Corp.* v. *United States*, 569 F. Supp. 870 (Ct. Int'l Trade 1983), *vacated on other grounds*, slip op. 84-12 (Ct. Int'l Trade Feb. 24, 1984), the court reiterated its view that the possibility of inadvertent disclosure by in-house counsel warranted denial of access. 572 F. Supp. at 276. That earlier decision, specifically incorporated into the decision on appeal here, acknowledged USS's need for the information but said that the information's nature and volume required a focus on the possibility of inadvertent disclosure. Though it accepted representations that the present in-house counsel are not involved in competitive decisions, the CIT nonetheless denied access to in-house counsel because of their "general position" and "reasonable assumptions that they will move into other roles."

The CIT certified the access question in its decision. 572 F. Supp. at 277. This court granted USS's petition for review of that question on November 10, 1983, under 28 U.S.C. § 1292(a)(1), *as amended by* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 125(a), 96 Stat. 25, 36 (1982).

The case has proceeded with access granted to retained counsel and denied to in-house counsel.

The United States joins USS in arguing that the CIT's decision constitutes a *per se* ban on access by in-house counsel and should be reversed in favor of a case-by-case balancing test without regard to whether counsel are in-house or retained.

The ITC takes no position on the present court-denial of access, but seeks to preserve its right to deny access by in-house counsel at the administrative level. Intervenors Companhia Siderurgica Paulista, S. A. (COSIPA) and Usinas Siderurgicas de Minas Gerais, S. A., of Brazil and Companhia Siderurgica Nacional are exporters of steel products seeking affirmance of the present denial. European exporters filed a brief *amici curiae* urging affirmance. Bethlehem Steel Corporation filed a brief *amici curiae* in support of reversal.

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[1] *Republic Steel Corp.* v. *United States*, 572 F. Supp. 275 (Ct. Int'l Trade 1983).

ISSUE

Whether the CIT erred in denying the present motion for access.

OPINION

The authority of the CIT under 19 U.S.C. § 1516a(b)(2)(B) to control access to confidential information in cases before it is not in dispute.[2] In exercising that control in this case, the CIT carefully reviewed *Atlantic Sugar, Ltd.* v. United States, 85 Cust. Ct. 133, C.R.D. 80-18 (1980) and available authorities dealing with access in other fields of law, made clear that its rationale carried no reflection on the unquestioned integrity and unblemished record of USS' in-house counsel in adhering to protective orders, and indicated that retention of outside counsel was a reasonable way for USS to satisfy its recognized need for the requested information. Serving the interest of early and just resolution, the CIT certified to this court the question of whether access may be denied solely because of counsel's in-house status.

Emphasizing congressional concern for confidentiality and the statutory provision, 19 U.S.C. § 1516a(b)(2)(B) for maintenance of confidentiality, the CIT denied access. It did so, however, only to in-house counsel, because of its concern, as it said, "solely with the greater risk of *inadvertent* disclosure within the corporate setting" (CIT's emphasis).

Because what the CIT called the "extremely potent" information in this case fills several volumes and is intermixed with nonconfidential information, the CIT said "its nature and volume place it beyond the capacity of anyone to retain in a consciously separate category" and that "it is humanly impossible to control the inadvertent disclosure of some of this information in any prolonged working relationship." The CIT recognized that those statements applied equally to retained counsel, but also recognized that applying it to both in-house and retained counsel would render adversarial proceedings impossible.

The CIT's well-taken concern for the nature and scope of the information would be eminently applicable to (and would doubtless complicate) the crafting of a suitable protective order. That concern, coupled with the CIT's emphasis on protection of confidentiality might have justified denial of access to all and sundry. Once it became clear that access must be granted, however, it was error to deny access solely because of in-house counsel's "general position" and "reasonable assumptions" that present in-house counsel will move into other positions within USS.

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[2] 19 U.S.C. § 1516a(b)(2)(B) provides:

Confidential or privileged material.—The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

The denial of access here rested on the court's stated general assumption that there is "a greater likelihood of inadvertent disclosure by lawyers who are employees committed to remain in the environment of a single company". Denial or grant of access, however, cannot rest on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order. Indeed, it is common knowledge that some retained counsel enjoy long and intimate relationships and activities with one or more clients, activities on occasion including retained counsel's service on a corporate board of directors. Exchange of employees between a client and a retained law firm is not uncommon. Thus the factual circumstances surrounding each individual counsel's activities, association, and relationship with a party, whether counsel be in-house or retained, must govern any concern for inadvertent or accidental disclosure.

The CIT distinguished in-house from retained counsel because, as it said, "a clear and more sustained relationship can be presumed as an outgrowth of the employer-employee relationship". It therefore saw exclusion of in-house counsel as providing "a meaningful increment of protection". Like retained counsel, however, in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsel provide the same services and are subject to the same types of pressures as retained counsel. The problem and importance of avoiding inadvertent disclosure is the same for both. Inadvertence, like the thief-in-the-night, is no respecter of its victims. Inadvertent or accidental disclosure may or may not be predictable. To the extent that it may be predicted, and cannot be adequately forestalled in the design of a protective order, it may be a factor in the access decision. Whether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined, as above indicated, by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained.[3]

Meaningful increments of protection are achievable in the design of a protective order. It may be that particular circumstances may require specific provisions in such orders. In such cases, the order would be developed in light of the particular counsel's relationship and activities, not solely on a counsel's status as in-house or retained.

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[3] The parties have referred to involvement in "competitive decisionmaking" as a basis for denial of access. The phrase would appear serviceable as shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor.

In a particular case, *e.g.*, where in-house counsel are involved in competitive decisionmaking, it may well be that a party seeking access should be forced to retain outside counsel or be denied the access recognized as needed. Because the present litigation is extremely complex and at an advanced stage, and because present in-house counsel's divorcement from competitive decisionmaking has been accepted by the CIT, forcing USS to rely on newly retained counsel would create an extreme and unnecessary hardship.

Our decision here bears no relation to, and can have no effect on, ITC's rule establishing a *per se* ban on disclosure to in-house counsel in its administrative proceedings. That rule is not before the court. The policy of an administrative agency faced with specific tasks and deadlines cannot of course control a trial court's discretion in managing the litigation before it. Congress has granted discretion to control access to confidential information, in cases like the present, to the CIT. Whether the exercise of that discretion in the course of litigation would unacceptably "chill" the willingness to disclose such information at the administrative level is a matter for the Congress. On the other hand, our holding here, that access be retained as well as in-house counsel should be governed by the facts, may serve to reassure disclosures of confidential information.

It is unnecessary for us to resolve the parties' dispute over whether the apparent emphasis on confidentiality in 19 U.S.C. § 1516a(b)(2)(B), or the asserted emphasis on discovery in Rule 26, Fed.R.Civ.P. should control in this case. Though the requirement to consider the facts rather than status of counsel sounds in Rule 26 terms, it relates here only to cases in which the court has decided to grant access in accord with the authorization in the second sentence in 19 U.S.C. § 1516a(b)(2)(B), *supra*, note 2. Nothing here said diminishes the clear authority of the CIT to deny access to all where the specific facts indicate a probability that confidentiality, under any form of protective order, would be seriously at risk. We do not here reverse the denial of access from which the certified question arose. Nor do we order a grant of access in the case listed in note 1, *supra*. We hold only that status as in-house counsel cannot alone create that probability of serious risk to confidentiality and cannot therefore serve as the sole basis for denial of access.

We have considered and find it unnecessary to discuss the arguments: that the CIT was here creating a *per se* rule requiring denial to all in-house counsel of access to any confidential information in all future cases; that the denial of access here constituted a violation of USS' right to choice of counsel or a disenfranchising of counsel without due process; that Rule 26, Fed.R.Civ.P., rather than 19 U.S.C. § 1516a(b)(2)(B), should have been applied; and that the "staleness" of the information sought should dictate access.

CONCLUSION

The certified question (whether access may be granted to retained and denied to in-house counsel solely on a presumption that inadvertent disclosure by the latter is more likely) is answered in the negative, *i.e.,* a denial of access sought by in-house counsel on the sole ground of their status as in-house counsel is error. In further proceedings, access should be denied or granted on the basis of each individual counsel's actual activity and relationship with the party represented, without regard to whether a particular counsel is in-house or retained.

DECISION

In light of the foregoing, the order denying access to in-house counsel in the case listed in note 1, *supra,* must be *vacated,* and the question *returned.*

VACATED AND RETURNED

NICHOLS, *Senior Circuit Judge,* dissenting.

I would affirm because I am not pursuaded that CIT Judge Watson abused his discretion. His decision has two things going for it this court does not mention. *First,* he conforms practice in his court to that of the ITC. We may say the ITC rule is not before us, yet we cannot overlook the anomaly that will exist if the court and the ITC enforce conflicting rules respecting the same documents. *Second,* the intervenors, original sources of the information in question, are willing for the court to allow disclosure to retained but not to in-house counsel. What they think is important because, if they consider the litigation is conducted in a manner unfair to them and in effect a nontariff barrier to their trade, they could withdraw their marbles from our game and invite their own government to take retaliatory action against United States trade.

Under all the circumstances, Judge Watson well may have thought whatever faults his disposition might suffer from—and hardly could he have imagined it was faultless—alternatives were worse. Factual inquiry into the relationship of in-house counsel with the makers of business policy in their companies, has an appearance, it cannot be denied, of greater fairness. One hopes, but does not much believe, it will not degenerate in practice into an invidious effort to throw doubt on the ability—if not the willingness—of certain members in good standing of the CIT bar, who happen to be currently employed as in-house counsel, to resist pressures to violate protective orders or not to yield "inadvertently." Not in this case, perhaps, but in cases for which this will be a precedent. At best a way is found to prolong the litigation and make it more costly. The CIT judge will have to lay out a pretty rigid method of trial of this issue, one that will keep things within seemly limits and not take forever to implement, thus limiting the damage to what is endurable.

I would be, on remand, inclined to consider seriously adoption of a simple alternative rule which our court majority also seems not to exclude, *i.e.*, if a document is too sensitive to disclose to any counsel of record, in good standing as a member of the CIT bar, it is too sensitive to disclose to any or all other such counsel. This is, I suppose, rejected by the CIT on its theory, as explained by Judge Watson, that the second sentence of 19 U.S.C. § 1516a(b)(2)(B) nullifies the first once the court has examined the material *in camera*. Apparently the effect of the two sentences is believed to be to achieve practically nothing different from what Fed.R.Civ. P. 26 would effectuate if the Trade Agreements Act of 1979 had said nothing. The court majority here implies something different possibly to be the rule inasmuch as nothing in the second sentence requires grant of access to anyone. The supposed necessity of discriminating between retained and in-house counsel is, or may be, somewhat of a self-created dilemma. While the general rule is that sufficient necessity on the part of the discovering litigant will override any degree of sensitivity, this may not be so where § 1516a(b)(2)(B) is applicable. Such an interpretation would recognize the differences in litigation where foreign traders and governments are so strongly interested in the procedure as well as the outcome, and relieves Congress of the imputation of having enacted futile "weasel" words. The matter has not been briefed and I do not wish to seem to rule upon it, even if, writing as a minority, I could. It seems to me that, without discriminating among counsel or having to decide who is trustworthy, a court might find some other way of dealing with the problem. For example, a court appointed expert, acceptable to both sides for expertise and impartiality, might examine the documents and advise the court as to what they reveal, in sanitized terms sufficient to support a legal conclusion, yet not divulging business or trade secrets.

At any rate, the effect of the decision below, if it had stood, and if United States Steel had still refused to retain outside counsel as the CIT judge hoped it would, is not necessarily denial of justice to United States Steel, but a different thing, denial of the benefit of house counsel's advocacy. If United States Steel's counsel cannot examine these papers, it becomes incumbent on the court to examine them itself, *in camera*, and arrive at a just and lawful decision using its own very considerable intellectual powers. If this were the result, justice might possibly gain instead of losing, and I say this not meaning to denegrate the benefit to the court of adversary counsel's advocacy. This is a benefit, a great one, but one the court, if it must, can do without.

E.R. HAWTHORNE & CO., INC., A/C VEPED TRAFFIC CONTROLS, INC., APPELLEE v. UNITED STATES, APPELLANT

Appeal No. 83-1379

730 F.2d 1490

(Decided March 28, 1984)

Deborah E. Rand, of New York, New York, argued for appellant. With her on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director, and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

John S. Rode, of New York, New York, argued for appellee. With him on the brief was *R. Brian Burke*.

Appealed from: U.S. Court of International Trade.
Judge BOE.

Before BALDWIN, *Circuit Judge*, NICHOLS, *Senior Circuit Judge*, and KASHIWA, *Circuit Judge*.

NICHOLS, *Senior Circuit Judge*.

STATEMENT OF THE CASE

This case involves the proper tariff classification of tapered or conical steel poles 20 to 39 feet long and chiefly used after finishing to support street or highway or other outdoor lights. The District Director of Customs at Houston, Texas, classified them as "Illuminating Articles and parts thereof, of base metal, Other * * *," Tariff Schedules of the United States (TSUS), Item 653.39, at 17.6% ad valorem. By virtue of 28 U.S.C. § 2639(a)(1), this classification is presumed to be correct and the burden of proving otherwise rests upon the party challenging the decision. The Court of International Trade (CIT) sustained the importer's protest, holding that the proper classification was "Pipes and tubes and blanks therefor * * * steel," TSUS Item 610.32, at .03¢ per pound, 572 F. Supp. 1279 (Ct. Int'l Trade 1983). The importer claims other classifications as alternatives, but we need not consider them. We hold that it failed to sustain its burden of showing that the district director's classification was incorrect. The CIT decision was therefore erroneous as a matter of law and cannot be sustained.

The competing classifications are more fully set out in that decision with a fuller description of the merchandise and how it is produced. It is only necessary to add here the fact the CIT relied on, namely, that the imported merchandise receives further processing and advancement in the United States before it can be incorporated as a finished part into the complete lighting fixture as installed. A base plate is often welded on the bottom of the pole after importation, clamps to support a mast arm are welded at the top, the pole is, if necessary, cut at the top to the exact length specified, the ends are squared, provision is made at times for a handhole ring to be made and attached for connection of the wires, the pole is paint-ed or galvanized, and, if necessary, a transformer base is attached. About half the cost and one-third of the time required for a complete finished part is thereby incurred after importation; however, the pole as imported is in its shape and dimensions made to conform to the user's specifications and drawings and would not be accepted by anyone else. There is no dispute in the evidence that subject to random other uses, articles of the class or kind of those imported have a use as stated above exceeding all other uses and if chief use controls the tariff classification, by General Headnote 10(e), chief use is as unfinished parts of lighting fixtures.

Various other relevant headnote provisions of TSUS remain to be noticed.

By General Headnote 10(c) an imported article "described in two or more provisions of the schedule," is classifiable in the provision which most specifically describes it.

By General Headnote 10(h) a tariff description of an article covers the article "whether finished or not finished."

By General Headnote 10(ij)—

> A provision for "parts" of an article covers a product wholly or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

However, Item 610.32, the classification of the imported items as held by the CIT, falls within Part 2 of Schedule 6 of the TSUS, and a headnote applicable to items in that part provides—

1. * * * This part does not include

* * * * * * *

> (iv) Other articles specially provided for elsewhere in the tariff schedules, or parts of articles.

OPINION

Looking at the issue on the basis of the headnotes, apart from the case law, the correctness of the district director's choice of classification seems manifest. The headnote to Part 2 of Schedule 6, the last cited above, and which the CIT judge never mentions, conflicts with the last part of General Headnote 10(ij) and prevails, because it is more specific, dealing with respect to items only in Part 2, of which Item 610.32 is one. Parts of illuminating articles are themselves classed as illuminating articles by virtue of an express provision, 653.39 TSUS. (The reader will have to be patient with the two distinct meanings of the word "Part;" that are inherent in the TSUS and makes a little extra concentration necessary on—heaven forgive us!—the reader's part.)

The trial court, by ignoring the headnote to Part 2 of Schedule 6, concluded the merchandise could not be classified as a part, because it was otherwise specifically provided for in the tariff schedule—an application of the Headnote 10(ij) "specificity test." The effect of Headnote 1(iv) of Part 2, Schedule 6, is to render the

Headnote 10(ij) "specificity test" inapplicable to Schedule 6, Part 2. The result is that since the items in issue are parts of illuminating articles, they must be classified as such, even if they are tubes or pipes. The poles are not excluded from the category of "parts" because of being unfinished, since by General Headnote 10(h) they are covered as unfinished articles, provided they are chiefly used as parts as is the case here.

Under the TSUS, applicability of a "parts" classification is controlled by chief use, not actual use. *United States* v. *John V. Carr & Son, Inc.*, 495 F.2d 771 (CCPA 1974). However, the CIT judge held that an unfinished part was not a part for tariff purposes until so far advanced that it was exclusively dedicated to use as a part, *i.e.*, was a finished part. This conflicts with the first portion of General Headnote 10(c) which allows a product chiefly used as a part to be treated as a part. Obviously, if it has other uses, even if only random, it cannot be exclusively dedicated. The CIT judge seems further to require that to be a part an article must be finished, contrary to General Headnote 10(h), *supra*.

The CIT judge relies on a fairly recent decision by one of our predecessor courts interpreting the TSUS: *Avins Industrial Products Co.* v. *United States*, 515 F.2d 782 (CCPA 1975), but the reliance is mistaken. In the first place, that decision and the one below, there reviewed, both affirm the district director and, therefore, in that case the CCPA decision needed only to support the presumption of correctness of the customs decision instead of overriding it. The competing provisions were stainless steel wire, Item 609.45, the customs service classification which was sustained, and Item 685.25, as it then was, parts of radio reception antennae. The opinion holds that as parts, the wires were unfinished, as stipulated, and that an unfinished part must be exclusively dedicated to the article of which it is to be a part, whereas these wires had other possible uses. All the evidence, however, was stipulated, and a reading of the stipulation in the decision below shows that it had nothing to say about chief use. In that case, therefore, the importer relied upon use of the actual imported articles themselves, not on chief use of all articles of the same class or kind. The *Avins* court below cited and relied upon other cases involving actual use and not chief use of unfinished articles; *Finn Bros., Inc.* v. *United States*, 454 F.2d 1404 (CCPA 1972) and *F. W. Myers & Co.* v. *United States*, 425 F.2d 781 (CCPA 1970).

According to Sturm, *Customs Law and Administration* (3d ed. 1983) § 54.9 at 42, the law before the existence of TSUS was well settled that to be classed as a part of another article, merchandise had to be "dedicated," *i.e.*, exclusively dedicated, for use with the other article. The meaning and intent of the TSUS was, she says, to broaden this, subject to the normal rule that an *eo nomine* designation (except in Schedule 6, Part 2) takes precedence over a designation as a part. Since in this case the normal rule does not apply because of the exception stated in the cited headnote to Schedule 6, Part 2, if the import is chiefly used as a part, it does not have to be wholly so used (*i.e.*) "dedicated." The CIT judge's authority for not observing the presumption of correctness of the customs determination therefore fails. Exclusive dedication remains important in cases, such as *Avins*, where chief use cannot be established.

In *United States* v. *Servco Co.*, 477 F.2d 579 (CCPA 1973), a TSUS case, one of our predecessor courts held that the Customs Service erred in classifying certain alloy steel products, "drill collars," as "other tubes," Item 610.52, and should have classed them as parts (unfinished) of boring and extracting machinery, then Item 664.05. The parties have some difficulty applying this decision as a precedent as it is stated to be "limited to its own facts," at 581, but it does appear to be inconsistent with the trial court's notion that *no* further processing is allowable after importation to make a part. The *Servco* opinion, whatever else it does, expressly rejects an argument there made on behalf of the government, that Schedule 6, Part 2, Headnote 1 (iv), is not a tariff description of an article such as to come under General Headnote 10(h), bracketing together for common tariff treatment finished and unfinished articles.

Both propositions the Customs Service relied on here are apparently supported by the literal language of TSUS and by case authority: *i.e.*, that chief use is the test, not exclusive dedication, to make a "part," and that the tariff treatment of an unfinished part is the same as that accorded to a finished part, other things being equal.

The CIT judge's statement that chief use cannot be ascertained is not a finding of fact—the evidence was all to the contrary—but a legal conclusion that the chief use test is to be applied, not to the unfinished article as imported, but to some other hypothetical article to be produced from it, which would be a part not unfinished, but finished.

CONCLUSION

Accordingly, the decision of the Court of International Trade is *reversed*.

REVERSED

MELAMINE CHEMICALS, INC., APPELLEE *v.* UNITED STATES, APPELLANT

Appeal No. 83-1364

732 F.2d 924

(Decided April 19, 1984)

Francis J. Sailer, of Washington, D.C., argued for appellant. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Velta A. Melnbrencis*, Assistant Director.

Bruce E. Clubb, of Washington, D.C., argued for appellee. With him on the brief were *B. Thomas Peele* and *Arthur L. George*.

Appealed from: U.S. Court of International Trade.
Judge LANDIS.

Before MARKEY, *Chief Judge*, COWEN, *Senior Circuit Judge*, and BALDWIN, *Circuit Judge*.

MARKEY, *Chief Judge*.

Appeal from the order of the United States Court of International Trade (CIT) rescinding an Amended Final Negative Determination of the Department of Commerce (Commerce), and from a judgment holding unlawful the Commerce' use of the preceding quarter's exchange rate in the fair value investigative phase of a particular anti-dumping proceeding. We vacate and reverse.

BACKGROUND

On February 23, 1979, Melamine Chemicals, Inc. (Melamine) filed a complaint with the Department of the Treasury (Treasury) alleging sales at Less Than Fair Value (LTFV) of melamine from the Netherlands. Treasury initiated antidumping investigations on May 1, 1979, and published a Tentative Negative Determination (that there had been no sales at LTFV) on November 13, 1979. (44 Fed. Reg. 65517).

On January 2, 1980, Commerce' International Trade Administration Division (ITA), having assumed Treasury's responsibility for LTFV determinations, announced (45 Fed. Reg. 12466) that it found error in Treasury's computations and that there was a dumping margin (LTFV). ITA changed Treasury's Determination to an Affirmative Preliminary Determination.

After a hearing and reception of briefs, Commerce issued an Affirmative Final Determination (45 Fed. Reg. 20152) effective March 27, 1980. On reconsideration and after a hearing and reception of additional briefs, Commerce amended its original findings and published an Amended Final Negative Determination on May 5, 1980, occasioning this litigation.

Pursuant to 19 U.S.C. § 1673d(c)(2), Commerce terminated the investigation in view of its negative determination. (45 Fed. Reg. 26918.)

Melamine's challenge to the Amended Final Negative Determination, filed in the CIT pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), raised a number of issues.[1] On appeal, Melamine maintains that Commerce may not in conducting a fair value investigation lawfully use exchange rates from the quarter preceding the period (November 1, 1978—April 30, 1979) being investigated, because a statute, 31 U.S.C. § 372 (now codified at 31 U.S.C. § 5151; cited here as § 372),[2] requires use of the exchange rate prevailing for the quarter in which the merchandise was exported.

PROCEEDINGS IN THE CIT

Upon cross-motions for summary judgment, the CIT held that Commerce acted unlawfully in applying the preceding quarter's exchange rate. *Melamine Chemicals, Inc.* v. *United States*, 561 F. Supp. 458 (Ct. Int'l Trade 1983).

In its opinion dated August 25, 1983, the CIT stated:

> "19 C.F.R. § 353.56[3] mandate[s] * * * conversion of foreign currency * * * to determine the difference between United States price and fair value or foreign market value *shall* be made in accordance with the provisions of 31 U.S.C. § 372" *Id.* at 462. (emphasis in the original)

* * * * * * *

> "19 C.F.R. § 353.56(a) specifically mentions both *fair value* and *foreign market value* as being *subject to 31 U.S.C. § 372.* * * * By defendant's [United States'] own admissions an antidumping order is not imposed at the fair value stage of the investigation.

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[1] Melamine raised due process issues (improper ex parte contacts and inadequate notice), and challenged Commerce' authority to amend a Final Determination. Those issues were not reached by the CIT and are not before us.

[2] 31 U.S.C. § 372 provides in pertinent part:

Conversion of currency

(b) Proclaimed value basis of conversion.

For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after June 17, 1930, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subsection (c) of this section, shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of subsection (a) of this section, for the quarter in which the merchandise was exported.

(c) Market rate when no proclamation

(1) If no value has been proclaimed under subsection (a) of this section for the quarter in which the merchandise was exported, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate at noon on the day of exportation, then conversion of the foreign currency involved shall be made—

(A) at a value measured by such buying rate, or

(B) if the Secretary of the Treasury shall by regulation so prescribe with respect to the particular foreign currency, at a value measured by the buying rate first certified under this subsection for a day in the quarter in which the day of exportation falls (but only if the buying rate at noon on the day of exportation does not vary by 5 per centum or more from such first-certified buying rate).

(2) [definition of "buying rate" and various methods for its calculation].

[3] 19 CFR § 353.56 provides:

(a) Rule for conversion. In determining the existence and amount of any difference between the United States price and the fair value or foreign market value for the purposes of this part or of the Act, any necessary conversion of a foreign currency into its equivalent in United States currency shall be made in accordance with the provisions of section 522 of the Tariff Act of 1930, as amended (31 U.S.C. 372):

(1) As of the date of purchase or agreement to purchase, if the purchase price is an element of the comparison; or

(2) As of the date of exportation, if the exporter's sales price is an element of the comparison.

(b) *Special rules for fair value investigations.* For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.

Therefore, it would be impossible to have an assessment and collection of duties at that juncture. If *defendant's contention* were upheld it would render *certain language referring* to fair value in *19 C.F.R. § 353.56(a) meaningless.* It is evident that a fair value proceeding and investigation is subject to the conversion rules of 31 U.S.C. § 372." *Id.* (emphasis added).

* * * * * * *

"[W]hat defendant [United States] does not demonstrate is the *statutory authority* for the enactment of 19 C.F.R. § 353.56(b) and the authority for using a '90 day lag rule'. * * * The provisions relating to the imposition of antidumping duties were intended to streamline the domestic procedures relating to antidumping actions. Thus, a regulation such as 19 C.F.R. § 353.56(b) promulgated in the spirit of improving administration of the antidumping law by expediting its investigative phase and improving overall efficiency is well within the intent of the legislature". *Id.* at 463 (emphasis added).

* * * * * * *

"It is axiomatic that where there is a conflict between a statute enacted by the legislature and a rule or administrative regulation promulgated by an administrative agency in accordance with the statute, the statute must prevail." *Id.*

* * * * * * *

"In the present case there is a specific statute, 31 U.S.C. § 372, that authorizes the methodology for currency conversion. * * * The Customs regulation in issue was promulgated pursuant to the Trade Agreements Act of 1979. *On the surface it is harmonious with the legislative enactment.* However, Customs' application (the 90 days lag rule) of the statute is *hardly in keeping with the legislative intent.* In viewing the entire picture one realizes that it is not a mere ninety (90) days for currency fluctuation purposes. By using the currency rate of the preceding quarter for conversion purposes, Commerce is actually permitting the foreign exporter 180 days to rectify its pricing practices to insure that it does not sell at LTFV". *Id.* at 464. (emphasis added).

Thus the CIT described 19 CFR § 353.56(b) as in conflict with 31 U.S.C. § 372 and unsupported by statutory authority, while at the same time describing that regulation as "well within the intent of the legislature," designed for "improving administration of the antidumping law by expediting its investigative phase and improving over-all efficiency", *Id.* at 463, and on the surface "harmonious with the legislative enactment". *Id.* at 464.

The court went on to find Customs' application of "the statute" not "in keeping with the legislative intent", *Id.* and concluded that "Commerce's arbitrary *application* of the preceding quarter's conversion rate is outside the scope of the enabling statute [31 U.S.C. § 372]." *Id.* (emphasis added).

In the court's view, an earlier-proposed 45-day lag, though "the legislature specifically permitted" it, would not be a proper basis for believing that Congress would accept a 90-day lag rule as falling within the "reasonable period of time" language of the regulation involved here (19 C.F.R. § 353.56(b)). *Id.* at n.11.

Thus, whatever may have been the view of the CIT respecting the validity of § 353.56(b) itself, its decision can be said to have rested on its conclusion that Commerce had no authority to apply the preceding quarter's exchange rate in conducting a fair value investigation.

The CIT ordered recision of Commerce' Final Negative Determination, remanded the action to Commerce to determine "whether the Netherlands sold melamine at LTFV between November 1, 1978 and March 31, 1979", and directed the Secretary of Commerce to report his redetermination to the CIT within 120 days.

Upon counsel's stipulation, the CIT, also on August 25, 1983, suspended liquidation of melamine entries from the Netherlands after September 5, 1983, and stayed, pending this appeal, orders it had issued on March 25, 1983, and August 16, 1983.[4]

Issues

(1) Whether the CIT erred in holding that Commerce is without authority to apply the exchange rate from the preceding calendar quarter in calculating fair value in an antidumping proceeding when prices under consideration are affected by sustained exchange rate fluctuations.

(2) Whether the CIT erred in rescinding Commerce's Amended Final Negative Determination.

Opinion

(1) *In General.*

Though the CIT did not clearly appear to hold § 353.56(b) invalid, and Melamine recognizes that the appealed order and judgment may be affirmed without reaching that question, the CIT's finding of "conflict" with a statute and Melamine's assertions here that the regulation is invalid, impel an expression of our view.

When the issue is the validity of a regulation issued under a statute an agency is charged with administering, it is well established that the agency's construction of the statute is entitled to great weight. *Zenith Radio Corp.* v. *United States,* 437 U.S. 443 (1978); *Udall* v. *Tallman,* 380 U.S. 1 (1964); *Selman* v. *United States,* 498 F.2d 1354, 1356 (1974). Similarly, agency regulations are to be sustained unless unreasonable and plainly inconsistent with the statute, and are to be held valid unless weighty reasons require otherwise. *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1575 (Fed. Cir. 1983); *Zemurray Foundation* v. *United States,* 687 F.2d 97, 100–101 (5th Cir. 1982); *Mobil Oil Corp.* v. *Federal Energy Administration,* 566 F.2d 87, 93 (Temp. Emer. Ct. App. 1977); *Review Committee, Venue VII, Etc.* v. *Willey,* 275 F.2d 264, 272 (8th Cir. 1960). *See also, American Petroleum Institute* v. *Knecht,* 456 F. Supp 889, 906 (C.D. Cal. 1978). Applying those guidelines, we disagree with the CIT's indication that conflict exists between 19 CFR § 353.56(b) and 31 U.S.C. § 372.

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[4] The March 25, 1983 order granted Melamine's motion for review to the extent of remanding to Commerce for a redetermination report on whether melamine was sold at LTFV between November 1, 1978 and March 31, 1979. The court denied the United States' cross-motion for affirmance of Commerce' Determination.

The August 16, 1983 order denied the United States' motion to stay Commerce' filing of the redetermination report required by the March 25, 1983 order. The effect of the August 25, 1983 order staying a denial of a motion to stay is at best unclear. It would appear that the order staying the March 25, 1983 order rendered moot the August 16, 1983 order.

(2) *Relationship Between § 353.56 (b) and § 372.*

As discussed *infra,* the regulation under consideration, § 353.56(b), is derived from a regulation promulgated by Treasury in 1976, a regulation in turn derived from Treasury's administrative response to the United States' decision to abandon the gold standard and to permit the dollar to "float" on international exchange rate markets. The essence of § 353.56(b) is to permit the administering authority (now Commerce) to disregard a margin of dumping when that margin is created *solely* by flexible, temporary fluctuations in the exchange rate of a particular foreign currency against the United States dollar.

Though the CIT referred to § 372 as the "enabling statute", 19 CFR § 353.56 was published on February 6, 1980 (45 Fed. Reg. 8190) under the authority of 5 U.S.C. §301, and the Trade Agreement Act of 1979, Pub. L. 96–39, section 3(b), 93 Stat. 148, 19 U.S.C. § 2504.

Because § 372 provides for conversion of foreign currency into United States dollars, and because § 353.56(a) refers to fair value conversions as controlled by § 372, Melamine and the CIT focused on whether all fair value calculations must be controlled by § 372.

Because subsection (b) of § 372 expressly limits that statute's application to the "assessment and collection of duties upon merchandise imported into the United States," the United States strenuously urges the view that § 372 does not control Commerce' *investigations,* which involve neither the assessment nor the collection of duties upon imported merchandise.

The United States argues at length that an antidumping proceeding involves two distinct phases, a fair value investigative phase to which § 372 is not applicable and an assessment-collection phase to which § 372 is applicable. Though the argument is stated in terms of all antidumping investigations, the United States then says "It must be emphasized that 31 U.S.C. § 372 is generally applicable even in the investigative phase (19 CFR 353.56(a)) *unless* the limited circumstances in which the 'special rule' contained in 19 CFR § 353.56(b) comes into play are present in a particular case." [5]

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[5] Commerce is statutorily required to assess duties on the basis of a price comparison between the foreign market value of the merchandise at the time of exportation to the United States and the United States price at the time of importation, 19 U.S.C § 1677b(a)(1), and the regulations so reflect. 19 CFR § 353.56.

Though Melamine appears to recognize some distinction between the two phases described by the United States, it argues in terms of all antidumping duty proceedings and analogizes them to proceedings of the Internal Revenue Service, citing the presence of "assessment and collection" language in 26 U.S.C. § 7421 (the Federal Anti-Injunction Act) and in 31 U.S.C. § 372. On that premise, and though the CIT drew no similar analogy, Melamine says § 372 must control both phases of all antidumping duty proceedings. We disagree.

Melamine's argument by analogy rests on court statements that in the enforcement of the internal revenue laws "assessment" includes the "preliminary investigation as well as the final determination", *Calkins* v. *Smietanka,* 240 F. 138, 146 (N.D. Ill. 1917), and "includes the whole statutory mode of imposing the tax." *Jackson Lumber Co.* v. *M'Crimmon,* 164 F. 759, 763 (N.D. Fla. 1908). Melamine's citations of taxpayers' suits brought in contravention of the Anti-Injunction Act are inapposite.

Moreover, as discussed *infra,* Congress has afforded Commerce considerable latitude and discretion in implementing the antidumping duty laws, especially during the investigative fair value phase. It would not comport with that intent of Congress to diminish or destroy that latitude and discretion by applying court decisions interpreting a statute governing injunctions against enforcement of different tax laws.

Melamine incorrectly asserts that the ultimate purpose of a fair value investigation and calculation is the assessment and collection of antidumping duties. The purpose of a fair value investigation is to determine whether LTFV sales are occurring to the injury of domestic industry. Such investigations may or may not result in the assessment and collection of antidumping duties.

The notion that assessment and collection includes calculation of fair value, so that the two phases must be merged as argued by Melamine, has been laid to rest by the Supreme Court in *United States* v. *George S. Bush & Co.,* 310 U.S. 371 (1940), and in *Barr* v. *United States,* 324 U.S. 83 (1945).

The CIT noted the indication in § 353.56(a) that currency conversion in fair value determinations "shall be made in accordance" with 31 U.S.C. § 372, and said failure to subject every fair value investigation to § 372 would render the fair value provision in § 353.56(a) "meaningless". We disagree. The language of § 353.56(a) is not here involved and application of that subsection of the regulation is not affected by application of § 353.56(b).

What may have appeared to the CIT as a conflict between subsections (a) and (b) of § 353.56 is simply the not uncommon situation in which (b) is but an exception to (a). Sustaining the application of § 353.56(b) in this case does not preclude the United States from continuing to apply § 353.56(a) and § 372 to fair value determinations in normal exchange rate situations. As the language makes plain, § 353.56(b) establishes a "special rule" applicable only to those abnormal situations in which an *artificial* margin is caused *solely* by rapidly fluctuating, temporary exchange rates.

We need not, therefore, discuss in detail the extended arguments of the parties on whether § 372 must control all conversions involved in all phases of all antidumping proceedings. We have been cited to nothing in the record or briefs to indicate that § 372 forbids or prohibits the promulgation of a "special rule" applicable only to fair value investigations, permitting "a reasonable period of time" for price adjustments in view of sustained changes in exchange rates, and providing that price differences resulting *solely* from *temporary* exchange rate fluctuations will not count in fair value investigations.

The CIT said that when a statute and a regulation "promulgated in accordance with the statute [§ 372]" are in conflict, the statute must prevail. That statutes prevail over conflicting regulations is a truism. In the present case, however, we detect no disabling conflict between a regulation applicable to fair value investigations in a special exchange rate situation and a statute governing currency conversions in the assessment and collection of duties. The regulation was not "promulgated in accordance with" § 372, and we have been cited to no basis for finding it in conflict with the authority under which it was promulgated (5 U.S.C. § 301, Trade Agreement Act of 1979, Pub. L. 96-39, section 3(b), 93 Stat. 148; 19 U.S.C. § 2504). Thus no basis has been shown for an assertion of conflict between § 372 and § 353.56(b).

(3) *Authority for Issuance of § 353.56(b).*

The CIT said the United States had not demonstrated "statutory authority for the enactment of 19 CFR § 353.56(b)."

In *Smith-Corona Group* v. *United States, supra,* at 1571, this court said "[t]he Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, establishes an intricate framework for the imposition of antidumping duties in appropriate circumstances. The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor. The Secretary of Commerce . . . has been entrusted with responsibility for implementing the antidumping law. The Secretary has broad discretion in executing the law." The court further said, "Our review of the statute reveals tremendous deference to the expertise of * * * Commerce in administering the antidumping law." *Id.* at 1582.

Commerce is not, of course, at liberty to violate a statute. Yet Congress has recognized its own inability to anticipate in its legislation all "appropriate circumstances", every "factor", and all "foreign policy repercussions". There must be a statutory grant of authority, but the authority to issue a particular regulation may be expressed or implied from the grant. Commerce may not act arbitrarily or unreasonably, and may not abuse the discretion Congress has granted, but there is no stultifying requirement that it cite a statute detailing *in haec verba* the specific action it may take when confronted with a particular set of circumstances among the myriad that may occur. To so require would be to envisage a prescient Congress in continuous session and devoting a majority of its effort to writing statutes on the daily management of our international trade relations, including much of what may be considered administrivia.

In the legislative history of the Trade Agreements Act of 1979, Congress spoke specifically of its intent to grant "greater flexibility" to Commerce in conducting a fair value investigation:

> "The antidumping duty is equal to the margin of dumping, i.e., the amount by which the foreign market value exceeds the United States price of the merchandise. The provision retains the concept of 'fair value' for purposes of the investigative phase of an antidumping proceeding. The term fair value is not defined in current law nor in the bill. The Committee intends the concept to be applied essentially as an estimate of 'foreign market value' during the period of investigation so as to provide the Authority with greater flexibility in administration of the law."

H. Rep. No. 96-317, 96th Cong., 1st Sess. 59 (1979).

International currency realignments resulted from President Nixon's August 25, 1971 temporary suspension of convertibility of the dollar into gold or other reserve assets, resulting, as above indicated, in a "floating" dollar. On March 30, 1972, Treasury announced that in reaction to "recent international currency realignments" it would examine and consider many factors, including all the circumstances surrounding a given contract and importations made pursuant to it in determining whether margins resulting from international currency realignments warranted a determination of sales at less than fair value. The December 18, 1971 Smithsonian Agreement, designed to maintain fixed exchange rates, broke down by March 1973. On March 22, 1973, Treasury announced that in administering the antidumping duty laws it would disregard price discrepancies resulting solely from currency realignments occurring within 45 days of a change in exchange rates.

In light of the Trade Act of 1974 (P.L. 93-618, 83 Stat. 1976) and its attendant substantive and procedural changes to the antidumping duty laws, Treasury published proposed regulations revising 19 CFR Part 153 (the antidumping duty regulations) on July 23, 1975. 40 Fed. Reg. 30825, *et seq.* Among the proposed revisions to the antidumping duty regulations was section 153.52(b) which contained a "special rule" designed to reflect the new flexible, rather than fixed, exchange rate system. The proposed special rule provided that:

> "(b) For purposes of the fair value investigation, if a significant currency realignment occurred which affected the prices under consideration, no price discrepancies resulting solely from such currency realignment will be taken into account in fair value investigations with respect to relevant transactions taking place within 45 days of such realignment."

40 Fed. Reg. 30836 (July 23, 1975).

In the final revision of 153.52(b), the 45 day period was replaced with "a reasonable time", for the reason explained at 41 Fed. Reg. 26214 (June 25, 1976):

> "Paragraph (b) of section 153.52 has been changed to reflect the current international monetary system which is characterized by flexible, rather than fixed currency exchange rates. The revised paragraph will provide that for purposes of fair value investigations in which the facts justify it, a longer term basis for measuring changes in exchange rates may be utilized in making price comparisons. Less than fair value sales should therefore not occur in such cases as a result of brief exchange rate fluctuations."

Thus the concept of disregarding margins created artificially and solely by exchange rate fluctuations ("currency realignments") was developed immediately after the need arose and has remained available as an administrative practice ever since.

Indeed, Congress had constructive notice of the concept when it enacted the major revision of the antidumping duty laws found in the Trade Agreements Act of 1979. As above indicated, Congress indicated no intent to dissuade or prohibit the administering authority from using in fair value investigations a "special rule" relating to currency realignments.

On the present record, Commerce fully articulated the rationale underlying 19 CFR § 353.56(b):

> EXCHANGE RATE FLUCTUATIONS
>
> § 353.56(b) of the Department of Commerce Regulations governs situations where rapidly fluctuating exchange rates distort price comparisons between national markets. For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.
>
> The purpose of this regulation is clear. Antidumping investigations are meant to determine whether prices of merchandise sold in the United States are at less than "fair value." When exchange rates are fluctuating substantially, a given dollar price of a product in the United

> States could change technically from fair to "unfair" literally from day to day, even if the foreign price of the product denominated in the foreign currency, also remained constant. This result is not called for by the language or purpose of the Act. It would be unrealistic to expect business to change prices instantaneously to take account of fluctuating exchange rates. So too, weekly price changes could create substantial confusion and inconvenience for the customers of that business.
>
> The regulation, then, allows a reasonable period in which the business may take sustained exchange rate fluctuations into account. The regulation further instructs that temporary fluctuations should not be the sole basis for determinations of less than fair value sales. Businesses are to be given time to assess whether one currency has truly appreciated against another before changing their pricing practices.

45 Fed. Reg. at 29620.

We hold that issuance of 19 CFR § 353.56(b) constituted a reasonable exercise of the discretionary authority granted Commerce in the Trade Agreements Act of 1979.

(4) *Preceding Quarter Exchange Rate.*

Commerce also explained its application of a preceding quarter exchange rate under the "reasonable period" provision of its "special rule" in the present case:

> The period covered by this investigation was certainly one of volatile changes in the exchange rate between the dollar and the West German mark (the currency of the third country sales compared with the U.S. sales in this investigation). The dollar dropped steadily during the month of October 1978, rebounded sharply after President Carter's announcement in late October of special measures to strengthen the dollar, and then declined again in December.
>
> The comparison in the March 20 determination was based upon the certified quarterly exchange rate of the Federal Reserve Board. Comparison of prices for sales during a given quarter were based on the exchange rate for that quarter. The results were the margins noted earlier. When the comparison is made on the basis of the exchange rate in the preceding quarter [a one-quarter lag], however, there are no margins. There seems little doubt that this situation is exactly the type contemplated in § 353.56(b). The appropriate approach will vary from case to case, depending on the particular facts of the case.
>
> The conclusion that there had been no sales at less than fair value should have been reached simply by applying the regulation, because the margins were the sole result of exchange rate fluctuation. The precedents cited by respondent, particularly Motorcycles from Japan (43 FR 48754), reinforce this result. In that case the Treasury Department specifically applied a "one quarter lag" in determining whether there were less than fair value sales during a period in which the value of the Japanese

> yen changed significantly. Counsel for petitioner has argued that this case is not relevant because it involved an offer of price assurances by the respondent. The fact that an offer of price assurances was involved does not alter the proper method for making a fair value comparison, however.
>
> For the reasons stated above, I[6] conclude that melamine in crystal form from the Netherlands is not being nor is likely to be sold at less than fair value and the final determination is amended to reflect this determination.

45 Fed. Reg. at 29620.

Melamine does not challenge the factual underpinnings of Commerce' application of the 90 day lag rule. It is undisputed that the relevant period (November 1, 1978 through April 30, 1979) was characterized by volatile changes in the exchange rate between United States dollar and the West German mark. During the first quarter of 1979 the West German mark jumped 6 percent in value against the U.S. dollar, and then dropped 3.4 percent during the second quarter of 1979.

Because the entire period under investigation was marked by significant exchange rate fluctuations, an exporter pricing his goods during one quarter could not anticipate the effect of volatile exchange rate fluctuations occurring within that quarter. Commerce in the present proceeding used the exchange rate applicable to the quarter in which the sale for exportation was made, as prescribed by § 372, to determine whether a margin existed. That produced a weighted average margin of 2.18 percent. Commerce then, in applying § 353.56(b), looked back one quarter to the exchange rate in effect when the exporter was setting his prices in order to afford a "reasonable period of time to take into account" the exchange rate fluctuations. Application of the exchange rates from the preceding quarter disclosed that the 2.18 percent margin was artificial because it was attributable solely to volatile changes in the exchange rate. Neither the CIT nor Melamine has asserted that the exporter was actually engaged in a dumping operation or that the margin was in this case due to any cause other than volatile exchange rate fluctuations. Nor is it suggested that Commerce would have hesitated to make an affirmative determination if actual LTFV sales within the control of the exporter had been shown.[7]

Though the CIT noted that the United States had cited "no authority for using a 90-day lag rule", that authority stems from Commerce' duty to enforce fairly the antidumping laws by determining whether LTFV sales are or are *not* occurring. The purpose of the antidumping law, as its name implies, is to discourage the practice of selling in the United States at LTFV by the imposition of appropriately increased duties. That purpose would be ill-served by application of a mechanical formula to find LTFV sales, and thus a violation of the antidumping laws, where none existed. A finding of LTFV sales based on a margin resulting *solely* from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair.

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[6] Robert E. Herzstein, Undersecretary for International Trade, Department of Commerce.

[7] On appeal, neither party mentioned the CIT's statement that application of the preceding quarter's exchange rate permitted "the foreign exporter 180 days to rectify its pricing practices to insure that it does not sell at LTFV."

Affording the exporter a reasonable period of time to adjust its prices to volatile and temporary fluctuations in the exchange rate, on the other hand, is eminently fair and well within the discretion of Commerce in enforcing the antidumping laws by conducting fair value investigations and determining whether LTFV sales are actually occurring. Courts are inappropriate institutions, particularly where as here the record is silent on the question, to determine whether a "reasonable period" would entail a lag of 45 days, or 60 days, or 90 days. It is enough for present purposes to note that Commerce' conclusion that one preceding calendar quarter would provide the "reasonable period of time" envisaged in § 353.56(b) has not been shown to have been unreasonable.

Accordingly, in applying the "special rule" of 353.56(b) and affording a one-quarter lag so that a realistic and fair price comparison could be made, Commerce' decision to disregard margins caused solely by temporary fluctuations in the exchange rate, and to reach a Final Negative Determination, was reasonable and neither arbitrary nor in violation of law.[8]

(5) *The Recision.*

Melamine says 19 U.S.C. § 1516a(c)(1) requires that a decision by the CIT must control liquidation of all entries occurring on or after the publication of that court decision. If that court decision be overturned on appeal, Melamine says liquidations would then recommence under the original determination. We are unpersuaded that Congress could have intended the yo-yo effect on liquidations that could result from such a practice.

When Melamine filed its present complaint in February 1979, all entries of melamine from the Netherlands were being liquidated without regard to antidumping duties by virtue of Commerce' Final Negative Determination under 19 U.S.C. § 1673d. Under 19 U.S.C. § 1516a(c)(2), liquidations may be suspended pursuant to a preliminary injunction, and may then be retroactively governed by the

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[8] Melamine contends that in determining foreign market value nothing is left to Commerce' discretion, because 19 U.S.C. § 1677b(a)(1) requires application of the exchange rate existing at the time of exportation. That we deal here with fair value, not foreign market value (of which fair value is an estimate), is a fact fatal to Melamine's argument.

Similarly, Melamine argues that because foreign market value is a "price", and fair value is an estimate of that price, Commerce must use the exchange rate in effect at the time of the sale. The argument was not reached by the CIT. It is in any event unavailing in view of our holding that Commerce has discretion to employ a preceding quarter's exchange rates in a fair value investigation when the period under investigation is characterized by sustained exchange rate fluctuations.

Melamine's reliance upon *C.B.S. Imports Corp.* v. *United States*, 450 F. Supp. 724 (Cust. Ct. 1978), is equally unavailing. That was a reappraisement case, involving an assessment and collection of customs duties on a basis not here involved.

In its brief, Melamine says, without record citation, that 353.56(b) is unnecessary, because Commerce has consistently ruled that the date of sale for LTFV purposes is the contract date, and exchange rate fluctuations are therefore irrelevant. In view of our holding, we need not discuss the argument.

final court decision. Melamine never sought or obtained a preliminary injunction. Absent an injunction, 19 U.S.C. § 1516a requires that the challenged determination shall govern the liquidation of entries "while the litigation is proceeding." *See* S. Rep. No. 96-249, 96th Cong., 1st Sess. 248 (1979). The litigation is proceeding on appeal and there has been no final court decision on the validity of the challenged determination.

The CIT's decision does not indicate as to how the entries at issue should now be treated. At the government's urging and "upon stipulation of counsel", the CIT, in its August 25, 1983 order (now stayed), suspended liquidation of entries of melamine from the Netherlands after September 5, 1983. Melamine asserts that the recision issue is moot, but if the CIT's "recision" of Commerce' Final Negative Determination were considered as in effect, and though we have reversed on the exchange rate issue, there would be no administrative determination governing liquidation of the entries at issue and no "administrative closing" of the antidumping duty proceeding involving melamine from the Netherlands between November 1, 1978 and April 30, 1979.

The CIT improperly rescinded Commerce' determination. The administrative handling of the involved entries of melamine from the Netherlands can be effected only by (1) a preliminary injunction pursuant to 19 U.S.C. § 1516a(c)(2), or (2) a *final* court decision adjudicating the legality, *vel non*, of the challenged determination. 19 U.S.C. § 1516a(e).[9]

Accordingly, the order rescinding and remanding Commerce' Amended Final Negative Determination must be *vacated*, and the judgment holding that Commerce acted unlawfully in employing the preceding quarter's exchange rates in its application of 19 CFR § 353.56(b) to its fair value investigation in the present antidumping proceeding must be *reversed*.

VACATED AND REVERSED

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[9] 19 U.S.C. § 1516a(e) states:

(e) Liquidation in accordance with final decision.—If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—

> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and
>
> (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,

shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

JARVIS CLARK CO., PLAINTIFF/APPELLANT *v.* UNITED STATES, DEFENDANT/APPELLEE

Appeal No. 83-1106

733 F.2d 873

(Decided May 2, 1984)

Edward N. Glad, of Los Angeles, California, argued for appellant.

Michael P. Maxwell, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge FORD.

Before KASHIWA and SMITH, *Circuit Judges,* and WISDOM*, *Senior Circuit Judge.*

WISDOM, *Senior Circuit Judge.*

We consider here the proper judicial procedure for resolving an importer's complaint that the Customs Service has improperly classified its merchandise. We hold that the Court of International Trade is required to decide the correctness not only of the importer's proposed classification but of the government's classification as well. Because the trial court did not do so, we reverse and remand.

I

This case requires the court to grope for the proper words for describing an imported product which does not readily fit into the importer's proposed classification or the government's classification of the merchandise.

The items at issue in this case are tippler hoppers. These are mining cars used to haul and dump ores and wastes from underground mines. The cars run on narrow-gauge rails, have no brakes, and are not self-propelled.[1] When the plaintiff, Jarvis Clark Co., imported tippler hoppers from South Africa between May 1980 and February 1981, it created a problem in legal semantics for the Customs Service. The Service classified the tippler hoppers under item 690.15 of the Tariff Schedules of the United States (TSUS), as "Railroad and railway rolling stock: Passenger, baggage, mail, freight and other cars, not self-propelled", and assessed a duty of 18 percent. The plaintiff had difficulty in thinking of its imported product as railway rolling stock and sued in the Court of International Trade, alleging that the tippler hoppers should have been classified under TSUS item 664.08, which covers "Mechanical shovels, coal-cutters, excavators, scrapers, bulldozers, and other excavating, levelling, boring, and extracting machinery, all the foregoing, whether stationary or mobile, for earth, minerals, or ores: pile drivers; snow plows, not self-propelled; all the foregoing and parts thereof: * * * Other." The duty for item 664.08 is 4.4 or 4.7 percent, depending on the date of importation.

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* The Honorable John Minor Wisdom, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

[1] The parties stipulated to the following descriptive facts:

> "The tippler hoppers are designed for and used only to haul earth, minerals, or ores out of underground mines. The said tippler hoppers run on rails laid in underground mines. The tippler hoppers are not self-propelled. The standard gauge for railroad and railway rolling stock in the United States is 4 feet 8½ inches. The gauge of the tippler hoppers imported by the plaintiff is either 20 inches, 30 inches, or 36 inches. The tippler hoppers imported by plaintiff are not equipped with brakes and do not conform to all safety standards promulgated for railroad cars."

Jarvis Clark v. United States, 566 F. Supp. 344, 345 (CIT 1983) (sentence numbering omitted).

On cross-motions for summary judgment, the trial court held in favor of the government. *Jarvis Clark Co.* v. *United States*, Slip Op. 83-38, 566 F.Supp. 344 (CIT 1983). The court did not consider the correctness of the government's classification. Instead, it found the plaintiff's proposed classification incorrect and concluded, "Plaintiff has failed to overcome the classification of customs under Item 690.15."

The court found item 664.08 inappropriate for two reasons. First, it examined heading 84.23 of the Brussels Nomenclature,[2] the heading corresponding to TSUS item 664.08. Heading 84.23 covers

> "Excavating, levelling, tamping, boring and extracting machinery, stationary or mobile, for earth, minerals or ores (for example, mechanical shovels, coal-cutters, excavators, scrapers, levellers, and bulldozers); pile-drivers; snow-ploughs, not self-propelled (including snow-plough attachments)."

The explanatory notes state,

> "This heading covers machinery, other than agricultural machinery (heading 84.24) for 'attacking' the earth's crust (e.g.,: for cutting and breaking down rock, earth, coal, etc.; earth excavation, digging, drilling, etc.), or for preparing or compacting the terrain (e.g., scraping, levelling, grading, tamping or rolling). It also includes pile-drivers, snow-plough attachments and non-self-propelled snow-ploughs."

4 *Explanatory Notes* 1237. Because tippler hoppers are not used for "attacking the earth's crust", but rather for carrying materials out of the mine after the materials have been severed from the earth, the court concluded that item 664.08 is inapplicable.

The court also relied on TSUS Schedule 6, Part 4, Subpart B, Headnote 1(i). This headnote provides,

> "This subpart does not cover—

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[2] Customs Co-Operation Council, *Nomenclature for the Classification of Goods in Customs Tariffs* (5th ed. 1976) [Brussels Nomenclature], and *Nomenclature-Explanatory Notes* (2d ed. 1966) [*Explanatory Notes*]. The Brussels Nomenclature

> "was put forth by the Customs Cooperation Council, an international organization, for adoption by its member nations, with the idea that their tariff items might be made uniform in phraseology, even if the rates were different and this phraseology, becoming familiar, would help trade by reducing the uncertainty of exporters as to how their exports would fare with the customs of trading partners."

F. L. Smidth & Co. v. *United States*, 409 F.2d 1369, 1375 (CCPA 1969). Congress did not adopt the Nomenclature, but the Tariff Commission did follow much of its phraseology and the Nomenclature is often cited when clarification is required. *Id.* The predecessor to the Court of International Trade has held that the superior heading to item 664.08 is substantially the same as heading 84.23 of the Brussels Nomenclature. *Servco Co.* v. *United States*, 68 Cust. Ct. 83, 90 (1972), *aff'd*, 477 F.2d 579 (CCPA 1973).

> (i) cranes and other machines mounted on vehicles, on vessels or other floating structures, or on other transport equipment (see part 6 of this schedule). * * *"

The Explanatory Notes to the Brussels Nomenclature, heading 84.23, similarly provide that

> "Excavating, etc., machines are classified in heading 86.06 if they are mounted on wagons or trucks, of a kind suitable for coupling into a train running on a railway network of any gauge. * * * On the other hand, excavating, etc. machines mounted on trucks or platforms not meeting the specifications of true railway rolling stock remain classified in [heading 84.23]."

4 *Explanatory Notes* 1237[3]

The plaintiff argues that a tippler hopper is not "a machine mounted on a vehicle", because it has only one moving part. The court found, however, that if this were true, item 664.08 would be inapplicable because that item covers only "machines". The court did not address the plaintiff's argument that a tippler hopper is a "machine" but not a "machine mounted on a vehicle".

II

A presumption of correctness attaches to a classification by the Customs Service, and the importer[4] has the burden of proving that the classification is incorrect. 28 U.S.C. § 2639(a)(1) (Supp. V 1981); *E. R. Hawthorne & Co.* v. *United States,* 730 F.2d 1490, No. 83-1379, slip op. at 1 (Fed. Cir. Mar. 28, 1984); *United States* v. *H. M. Young Associates, Inc.,* 505 F.2d 721, 724 (CCPA 1974). To give effect to this presumption the courts have long imposed a "dual burden" of proof: the importer must prove not only that the government's classification is incorrect but also that the importer's proposed classification is correct. *E.g., United States* v. *A. Johnson & Co.,* 588 F.2d 297, 301 (CCPA 1978); *United States* v. *New York Merchandise Co.,* 435 F.2d 1315, 1318 (CCPA 1970); *United States* v. *Danker & Marston,* 2 Ct. Cust. App. 462, 464 (1912); *Tiffany* v. *United States,* 105 F. 766, 767 (S.D.N.Y. 1901). The rule apparently arose out of the formalities of pleading: an importer could prevail in a protest only if it pleaded the proper alternative classification, and the importer carried the burden of proving the facts pleaded. *Arthur* v. *Unkart,* 96 U.S. 118, 122-23, 24 L.Ed. 768, 770 (1878); *Fisk* v. *Seeberger,* 38 F. 718, 719-20 (N.D. Ill. 1889). The purpose of this rule was to ensure that the government could consider the alternative and ascertain facts sufficient to accept or refute it. *Davies* v.

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[3] The provisions cross-referenced in the headnote and explanatory note (TSUS Schedule 6, Part 6, and Nomenclature heading 86.06, respectively), both refer to railway rolling stock; however, as we note in part IIIA of this opinion, it is clear that tippler hoppers fall under Nomenclature heading 86.07, not 86.06.

[4] Under § 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (1982), a domestic interested party may also challenge a classification decision. For convenience this opinion uses the term "importer" to refer to any challenger of a government classification.

READEX FICHE

Arthur, 96 U.S. 148, 151–52, 24 L.Ed. 758, 759 (1878); *Bliven* v. *United States,* 1 Ct. Cust. App. 205, 208 (1911). The dual burden has also been explained as necessary to "the orderly administration of customs law". *New York Merchandise Co.,* 435 F.2d at 1318. The tariff schedules are so structured that many articles could fall under several different classifications, while others do not fit any classification perfectly; the decision of the Customs Service was considered correct until the importer pointed to a better classification.

The dual burden can, however, lead to unfair results, since it requires the court to affirm an incorrect government decision when the importer has failed to establish a correct alternative. When the Customs Service is unable to determine where an item belongs in the tariff schedules, it is anomalous to demand that the importer provide the correct answer. Moreover, the stability of the customs laws may be better served by a requirement that the Court of International Trade determine the correct classification for an item—rather than affirming an incorrect result because the importer's alternative is wrong—so that all future importers will know what the correct classification is. The desire for "uniform and consistent interpretation and application" of the customs laws is central to customs policy. H. Rep. No. 1235, 96th Cong., 2d Sess. 29, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3741 [House Report], quoting Chief Judge Re. Waste is avoided and the goals of the tariff laws are best promoted when importers know with some certainty how their imports will be classified and taxed before they import the goods.[5]

When Congress created the Court of International Trade in 1980, it granted that court the power to order certain remedies previously unavailable to the Customs Court. The Customs Courts Act of 1980 provides,

> "(b) If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision."

28 U.S.C. § 2643(b) (Supp. V 1981). The legislative history demonstrates that the principal purpose of this provision was to alleviate the unfairness of the dual burden of proof. The House Report states:

> "Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this

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[5] This desire for certainty is the same motivation that led, for example, to the development of the Brussels Nomenclature so that the terminology used in different countries might be uniform and predictable for importers. *See* note 2.

> remand power to the court, the Committee intends that the remand power be coextensive with that of a federal district court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.
>
> "Subsection (b) has particular impact on civil actions brought pursuant to section 515 or 516 of the Tariff Act of 1930. Under existing law, for example, in a civil action commenced under the court's jurisdiction to entertain cases involving the classification or valuation of merchandise, if the plaintiff succeeds in demonstrating that the original decision of the Customs Service was incorrect but is unable to establish the correct classification or valuation, the court dismisses the civil action. In effect, the court holds in favor of the United States even though the plaintiff has demonstrated that the challenged decision of the Customs Service was erroneous. Subsection (b) would permit the court in this situation to remand the matter to the Customs Service to make the correct decision or to schedule a retrial or rehearing so that the parties may introduce additional evidence."

House Report at 60–61, 1980 U.S. Code Cong. & Ad. News at 3772. By granting the power to remand or to retry an action, § 2643(b) eliminates the dual burden's potential for unfairness while providing the government an opportunity to develop evidence as to classifications not previously considered.

The government argues that § 2643(b) is only a grant of general equity powers and was not intended to have any effect on the burden of proof faced by an importer. But it is clear that Congress intended to alter the existing procedure for classification and valuation protests. As initially drafted, § 2643(b) applied *only* to such protests. The Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee later expanded the statute to apply to "any civil action". *See* House Report at 40–41, 1980 U.S. Code Cong. & Ad. News at 3752; S. Rep. No. 466, 96th Cong., 1st Sess. 20 (1979). But the House Report acknowledges that the provision was directed mainly at the dual burden of proof. The government also argues that, because the statute provides that the court "may" order retrial or remand, the power to remand is discretionary and need be exercised only in "special circumstances" where "the interests of justice might warrant a remand." Brief of Defendant/Appellee at 10. Nothing in the statute or legislative history indicates that the court has a duty to reach a correct result only in "special circumstances." *See House of Adler, Inc.* v. *United States*, 2 CIT. 274, 277–78 (1981). The statute is more logically interpreted as mandating that the court reach a correct decision in every case; but the statute leaves to the court the discretion whether it should remand for further proceedings or should reach the correct decision on its own. Remand may not always be the appropriate means for finding the right answer; however, whether the court remands, conducts its own hearing, or simply examines the law and the tariff schedules on its own initiative, it is required to reach a *correct* result.

The government notes that 28 U.S.C. § 2639(a)(1) (Supp. V 1981) reaffirms that a presumption of correctness attaches to a Customs Service decision, and the House Report states that § 2639(a)(1) "restat[es] existing law." House Report at 58, 1980 U.S. Code Cong. & Ad. News at 3770. The *dual* burden of proof, however, is not mentioned in § 2639(a)(1) or its legislative history. The legislative history mentions the dual burden only in connection with the remand and retrial provisions of § 2643(b). The clear intent of Congress was to change the operation of the dual burden by requiring the Court of International Trade to reach a correct result. This requirement is not inconsistent with the presumption of correctness embodied in § 2639(a)(1). The importer still has the burden of establishing that the government's classification is wrong. Ordinarily it will be difficult to meet this burden of proof without proposing a better classification. But the trial court cannot determine the correct result simply by dismissing the importer's alternative as incorrect. It must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative. In some cases, the government's classification may be so patently incorrect that the importer can overcome the presumption of correctness without producing a more satisfactory alternative. In other cases, the importer's alternative may have faults and yet still be a *better* classification than the government's. In either case, the court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand.[6]

III

In the present case the trial court did not consider the correctness of the government's classification, either independently or in comparison with the plaintiff's proposed alternative. It should have done so. Although, as the trial court found, there are problems with the plaintiff's proposed alternative, that alternative is clearly a *better* classification than the government's.

A

The Brussels Nomenclature classifies vehicles according to whether they travel on rails or guide-tracks (chapter 86), land or land and water (chapter 87), or water or water and ice (chapter 88). Chapter 86 covers not only true railway cars but also *all* cars that run on rails. Mining wagons and automatic unloading wagons are classified, along with railway freight cars, under heading 86.07,

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[6] In two cases decided after the effective date of the Customs Courts Act of 1980, this court's predecessor referred to elements of the dual burden of proof. *Nippon Kogaku (USA), Inc.* v. *United States*, 673 F.2d 380, 382 (CCPA 1982); *United States* v. *Miracle Exclusives, Inc.*, 668 F.2d 498, 500 (CCPA 1981). The effect of the 1980 Act was not argued by the parties, nor considered by the court, in either case. Furthermore, in neither case was the dual burden rule necessary to the court's decision. Our decision today does not impair the authority of the holding in either case. To the extent that this decision conflicts with dicta in those cases, this decision controls.

"railway and tramway goods vans, goods wagons and trucks". The explanatory notes state that heading 86.07 includes not only "vehicles for the transport of goods on railway networks (of any gauge)" but "*also* small vehicles or trucks for transport of goods by rail, in mines, on building sites, in factories, warehouses, etc." 4 *Explanatory Notes* 1480 (emphasis added). It is therefore apparent that although tippler hoppers may be classified under heading 86.07 they are *not* "railway rolling stock".

TSUS item 690.15, by contrast, covers "Railroad and railway rolling stock: Passenger, baggage, mail, freight and other cars, not self-propelled." The government argues that this classification is based on the Brussels Nomenclature. The government argues that "railroad" in TSUS is equivalent to "railway" in the Nomenclature while "railway" in TSUS corresponds to "tramway" in the Nomenclature. The government points to dictionary definitions of "railway" as "a rail-line with lighter weight equipment * * * than a main-line railroad", "any line of rails forming a road for flanged wheel equipment", and "tramway". The plaintiff, on the other hand, argues that "railway" is either synonymous with "railroad" or refers to light-rail passenger lines (e.g. streetcars and trolleys).

The particular choice of words in TSUS suggests that TSUS is not intended to follow the Brussels Nomenclature. If the drafters of TSUS meant to copy the Nomenclature, they would have been more likely to use the terms "railway and tramway" rather than to use "railway" to mean "tramway". The use of the term "railway", rather than "tramway", may have indicated an intent to include streetcars and trolleys, but *not* small mining and factory wagons, within item 690.15.

Because of the varying meanings of "railway" and "tramway" in Europe and America, comparisons between TSUS and the Nomenclature are unilluminating. When item 690.15 is read without reference to secondary sources, however, it is clear that tippler hoppers are not included. Item 690.15 includes "passenger, baggage, mail, freight and other cars". The natural reading of item 690.15 is that it includes what people customarily think of as railroad cars or trolleys. Tippler hoppers are not "freight cars", nor are they like the other cars on the list. They cannot be coupled with other types of cars to run on a railway, nor are they intended for such purposes; they have no air brakes; they do not conform to federal railway safety requirements.

The government counters that tippler hoppers are like the other cars listed in item 690.15 because "all are rolling stock with flanged wheels which run on rails". Brief for Defendant/Appellee at 24. The government's position is succinctly stated in the affidavit of its expert witness, an officer of a domestic mining-equipment manufacturer, who declares, "cars such as * * * the hopper cars * * * are considered by the trade to be railway rolling stock because they run on rails". Affidavit of Richard S. Button, Appellant's Appendix at 28. In other words, the government's position is that everything that runs on rails is railway stock. We disagree. The Tariff Classification Study and the legislative histories of earlier tariff schedules shed no light on the meaning of "railroad" or "railway". Nevertheless it seems likely that the highly protectionist 18 percent tariff on railroad rolling stock—by far the highest Column 1 (favored nation) tariff on any type of transportation equipment—was intended to protect the troubled American railroad industry, not American manufacturers of mining equipment. To extend item 690.15 to include items such as tippler hoppers would do violence to the common understanding of the terms "railroad" and "railway" and would place an unforeseen, undesirable, and unnecessary burden on the international trade in mining cars.

B

The trial court relied heavily on the provisions of Brussels Nomenclature heading 84.23 and on the headnote to item 664.08 for its conclusion that tippler hoppers are not "excavating and extracting machinery". The Nomenclature indicates that heading 84.23 covers only machinery that "attacks" the earth. The plaintiff argues, however, that item 664.08 should be interpreted more broadly than heading 84.23 because the Nomenclature specifically provides for mining wagons elsewhere (in heading 86.07) while TSUS does not. The plaintiff also argues that the TSUS headnote does not exclude tippler hoppers because they are not machines mounted on vehicles.

Both of these arguments have some merit. Because mining wagons are not grouped with railway cars in TSUS as they are in the Nomenclature, it is possible that they should be classified as mining machinery rather than as vehicles. And the plaintiff is correct that the TSUS headnote does not literally exclude tippler hoppers. That headnote excludes "cranes or other machines mounted on vehicles". The plaintiff argues that a tippler hopper is not a machine mounted on a vehicle but rather that the vehicle itself is the machine. The trial court erroneously interpreted this argument as an assertion that a tippler hopper is not a machine at all. Although a tippler hopper is both a machine and a vehicle, it may not be a "machine mounted on a vehicle": it is hard to imagine what purpose a tippler hopper without wheels could serve. It is also worth noting that the headnote's counterpart in the Brussels Nomenclature emphasizes that "machines mounted on trucks or platforms not meeting the specifications of true railway rolling-stock remain classified in [heading 84.23]". 4 *Explanatory Notes* 1237.

Item 664.08 better describes tippler hoppers than does item 690.15. Those in the trade would be far more likely to describe tippler hoppers as "mining machinery" than as "railway cars", if only because hardly anyone would be likely to describe them as "railway cars". Even the government's expert witness, perhaps inadvertently, referred to bottom-dump hopper cars as "mining equipment" before averring that they were "railway rolling-stock". Affidavit of Richard S. Button, Appellant's Appendix at 27. We also note that in an abstracted administrative decision, hopper loaders with rubber tires were held to be excavating or extracting machinery. T.D. 66-56(b), 101 Treas. Dec. 170 (March 1, 1966). The courts are not bound by this decision, but it does suggest that "excavating and extracting machinery", as commonly understood, does not exclude vehicles for hauling ores, notwithstanding the provisions of the Brussels Nomenclature.

In short, item 664.08 is a *better* classification for tippler hoppers than is item 690.15, even though item 664.08 may eventually prove to be incorrect as well. The plaintiff therefore carried its burden of establishing that the government's classification was incorrect, even though it may not yet have shown the correct answer. Under 28 U.S.C. § 2643(b), the trial court had the duty to find the correct answer by appropriate means.

C

If tippler hoppers are not classified under item 664.08, as excavating or extracting machinery, they probably fall under item 692.60, the basket provision for "Vehicles (including trailers), not self-propelled, not specially provided for, and parts thereof". The government argues that tippler hoppers could not properly fall into this category because its counterpart in the Brussels Nomenclature, heading 87.14, encompasses only hand-propelled vehicles, animal-drawn vehicles, and trailers, and tippler hoppers are not trailers. This argument is without merit. Item 692.60 is a basket provision. Although it may be primarily intended to encompass trailers it can certainly encompass mining wagons as well.

The government also argues that because the plaintiff did not mention item 692.60 before the trial court, it cannot do so now. This argument is the dual burden of proof in a different guise. The plaintiff met its burden of showing that the government's classification was incorrect. At that point it was the court's duty to find a correct answer. The plaintiff's failure to cite item 692.60 in the trial court does not preclude the court from considering that classification on its own initiative, nor does it preclude the Customs Service from reclassifying tippler hoppers under item 692.60 on remand after our determination that the government's first classification was wrong.[7]

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[7] The government also argues that because this case was submitted on a stipulation that did not include a request for remand, the plaintiff waived its right to a remand. We do not read the stipulation so broadly. The stipulation stated that "the only issue remaining in this action is the proper classification of the Tippler Hoppers". The plaintiff clearly did not waive its right to a correct decision.

IV

We hold that the plaintiff overcame the presumption of correctness and met its burden of showing that the government's classification was incorrect. Either item 664.08 or item 692.60 better describes tippler hoppers than does item 690.15, and it is possible that other classifications might apply as well. We therefore *reverse* the decision of the Court of International Trade and *remand* so that the court may determine the correct result. The trial court may, in its discretion, remand the case for reclassification by the Customs Service or decide the case itself.

REVERSED AND REMANDED

HENSEL, BRUCKMANN & LORBACHER, INC., APPELLEE *v.* UNITED STATES, APPELLANT

Appeal No. 83-1312

735 F.2d 1340

(Decided June 8, 1984)

Saul Davis, of New York, New York, argued for appellant. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Patrick D. Gill, of New York, New York, argued for appellees. With him on the brief was *John S. Rode*.

Appealed from: U.S. Court of International Trade.
Judge RAO.

Before RICH, KASHIWA, and SMITH, *Circuit Judges*.

SMITH, *Circuit Judge*.

In this customs valuation case appellant, the United States (Government), appeals from a judgment of the United States Court of International Trade (trial court), concerning the appraisement of industrial sewing machine needles imported by appellee, Hensel, Bruckmann & Lorbacher, Inc. (Hensel). We affirm.

ISSUES

The Government raises four issues before this court, contending that the trial court: (1) Committed reversible error in permitting the introduction of certain affidavits and letters; (2) erred in finding no freely offered price for certain sewing machine needles; (3) erred in finding no freely offered price for certain similar sewing machine needles; and (4) erred in entering judgment without a finding that the claimed export values for certain needles were correct.

BACKGROUND

We do not repeat here the factual and statutory background which the trial court set forth in its opinion.[1] We note that this case concerns industrial sewing machine needles which Hensel, a U.S. customs broker, imported from a West German manufacturer, Ferd. Schmetz GmbH (Schmetz), during the period 1975–80. The United States Customs Service (Customs) appraised these needles using foreign value, whereas Hensel claims, and the trial court agreed, that the needles should have been appraised using export value.[2]

OPINION

We note first that our standard of review of questions of fact is "clearly erroneous" and of questions of law is "not entitled to the deference we [exercise]" with questions of fact.[3]

1. The Affidavits and Letters

The Government first contends that the trial court committed reversible error in permitting the introduction of certain affidavits and evidence from "persons whose attendance [at trial] cannot reasonably be had."[4] In particular, the Government claims that the evidence so introduced was from the alleged real party in interest, the German manufacturer of industrial sewing machine needles, Schmetz, as opposed to the customs broker and importer of record, Hensel, whom the Government denominates a "paper plaintiff." Accordingly, the Government theorizes that its statutory right to cross-examine the other party's witnesses and to rebut its evidence[5] has been prejudiced.

We do not agree. The trial court has broad discretion under section 2639(c)(1) to determine the factual issue whether attendance of witnesses or deponents "cannot reasonably be had." Moreover, that provision refers to "persons," making no distinction between parties and nonparties, much less between "real" parties and "paper" parties. We have thoroughly reviewed the record in this case and find no reason to disturb the trial court's factual finding on the availability of those witnesses. For example, it developed that one critical witness, Mr. Applerath, was retired, of advanced age, and no longer under Schmetz' control. Another key Schmetz witness, Dr. Hagen, would have appeared at the trial noticed for July 29, 1981, but the Government opposed this date. We therefore find no clear error and affirm the trial court's finding.

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[1] *Hensel, Bruckmann & Lorbacher, Inc.* v. *United States*, 569 F. Supp. 849 (C.I.T. 1983).

[2] *See Hensel*, 569 F. Supp. at 850, setting forth the applicable statutory definitions of "foreign value" and "export value" found in 19 U.S.C. § 1402 (1976) (repealed 1979).

[3] *Daw Indus., Inc.* v. *United States*, 714 F.2d 1140, 1142 (Fed. Cir. 1983).

[4] 28 U.S.C. § 2639(c)(1) (1982).

[5] 28 U.S.C. § 2641(a).

Likewise, we have reviewed the record as regards the Government's subpoint that the Kuhn affidavit and the two Liebold letters were not admissible because they were not properly sworn "affidavits" as contemplated by section 2639(c)(1). The former affidavit was duly sworn before a West German notary, as was the second of the Liebold letters, which was essentially identical to the first. Moreover, the statute specifically excepts application of the Federal Rules of Evidence, including the rules pertaining to authentication of foreign documents to which the Government cites us, in this situation.[6] The trial court, in weighing the probative value to be given all of this "section 2639(c)(1)" evidence, has properly taken into account these concerns.[7]

2. The Freely Offered Price for Schmetz' Needles

Secondly, the Government attacks the trial court's holding that there was no freely offered price to all purchasers in West Germany for Schmetz' needles. The Government emphasizes that the price must be the freely "offered" price under the pertinent statute,[8] as opposed to the actual sales price. In this regard the Government focuses on Schmetz' offered prices to end users in the West German market, arguing that Schmetz' issued price lists constituted such offers, even though the end user may have actually paid a dealer.

The Government's position does not correspond to the facts, however, either as found by the court below or as evidenced in the ruling of Customs' Classification and Value Division. The trial court found persuasive Hensel's position that Schmetz restricts its offers for sales to end users through its dealers because Schmetz selects and monitors those dealers, rather than offering needles for sale to any and all dealers or distributors.[9] Customs also found, in its ruling dated June 28, 1979 (plaintiff's exhibit 22 in the record below), that Schmetz restricted its dealers as to sales territory and resale prices.[10] Our review of the record likewise leads us to conclude that, based on the facts in that record, the trial court correctly applied the law, and we affirm the trial court on this point.

3. The Freely Offered Price for Similar Needles

Thirdly, the Government contends that the trial court erred in finding no freely offered price for the sale of *similar* needles in West Germany. It bases its contention in part on an attempt to exclude or discredit the affidavits, which we have discussed above, and in part on evidence that Lammertz, Schmetz' main competitor in West Germany, had long taken the position before Customs that its needles were freely offered for sale in West Germany. The trial court fully considered the Government's evidence, offered in rebuttal to the prima facie case which Hensel established that Lammertz did indeed restrict the manner in which it offered its needles for sale in West Germany.[11] Our review of the record indicates no error in that holding, and we affirm.

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[6] 28 U.S.C. § 2641(a).

[7] Hensel, 569 F. Supp. at 852.

[8] 19 U.S.C. § 1402(c) (1976) (repealed 1979).

[9] *Hensel*, 569 F. Supp. at 851.

[10] Customs nevertheless concluded that foreign value existed because Schmetz made some direct sales to end users at list prices. The trial court rejected these sales after finding that they were "for less than the usual wholesale quantities." *Hensel*, 569 F. Supp. at 851.

4. The Judgment

Finally, the Government claims that the trial court erred in entering judgment against the Government because there was no finding that Schmetz' claimed export values for the needles were correct. This is flatly contradicted by the record, wherein the Government stipulated to the use of the specified Schmetz export price lists, should Hensel prevail on export value. We therefore *affirm* the trial court on this final issue as well.

AFFIRMED

JULIAN R. WOODRUM, DENNIS DORSEY AND SHERMAN JOHNSON, APPELLANTS *v.* UNITED STATES, APPELLEE

Appeal No. 84-651

737 F.2d 1575

(Decided July 3, 1984)

Robert S. Baker, of Beckley, West Virginia, submitted for appellants.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director and *Shiela N. Ziff*, of Washington, D.C., submitted for appellee.

Appealed from: U.S. Court of International Trade.
Chief Judge RE.

Before BALDWIN, SMITH and NIES, *Circuit Judges.*

NIES, *Circuit Judge.*

This appeal is from a judgment of the United States Court of International Trade [1] which affirmed the Secretary of Labor's determination that former employees of an independent new car dealership were not eligible for benefits under the worker adjustment assistance program of the Trade Act of 1974, 19 U.S.C. § 2101-2487 (1976). It was held that the firm which employed these workers (appellants here) did not "produce" articles, which is one requirement for eligibility under Section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3). Further, it was held that Congress intentionally chose to treat workers employed in a dealership controlled or substantially beneficially owned by the manufacturer differently from workers employed by an independent dealer. It is noteworthy that Congress considered this issue again, in regard to proposed amendments to Section 222, in 1979, but no legislation remedying this anomaly was enacted into law. Finally, the dissimilar treatment was found to have a "rational basis" in that Congress reasonably could provide benefits only to employees of a firm *producing* import-impacted articles since such workers were most immediately and directly affected by the imports. Thus, the classification of a worker on the basis of whether his firm produced the product could not be overturned on constitutional grounds.

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[11] *Id.* at 852.

[1] Reported at 5 CIT 191, 564 F.Supp. 826 (1983).

Appellants' arguments here were fully treated by Chief Judge Re. We agree with his analysis and *affirm* on the basis of his opinion.

AFFIRMED

FLORSHEIM SHOE COMPANY, DIV. OF INTERCO, INC., APPELLANT v. UNITED STATES, APPELLEE

Appeal No. 83-1371

744 F.2d 787

(Decided July 12, 1984)

William D. Outman, II, of Washington, D.C., argued for appellant.
Mumford Page Hall, II, of Washington, D.C., of counsel.
Michael P. Maxwell, of New York, New York, argued for appellee. With him on the brief were *Richard K. Willard,* Acting Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge NEWMAN.

Before DAVIS, BALDWIN and MILLER, *Circuit Judges.*

DAVIS, *Circuit Judge.*

This is an appeal from a decision of the Court of International Trade (CIT) dismissing, on the defendant's motion, plaintiff Florsheim Shoe Company's (Florsheim's) complaint against the United States (the Government). In that complaint, Florsheim challenged the United States Customs Service's denial of Florsheim's protests against the agency's classification of imported Indian buffalo leather and goat and kid leather, not fancy, as dutiable merchandise. The CIT properly decided that Florsheim was attacking the basis for Customs' denial of the protests—certain Executive Orders in which the President withdrew duty-free treatment (under the Generalized System of Preferences) from those Indian leather products [1]—and held that Florsheim had stated no claim upon which relief could be granted because, to the extent the President's action may be subject to severely limited judicial review, there was no ground for disputing it here. The CIT's opinion is reported at 570 F. Supp. 734 (CIT 1983). Florsheim also challenges an earlier CIT decision, suspending discovery pending disposition of the Government's motion to dismiss. *Florsheim Shoe Company* v. *United States*, No. 83-2 (CIT Jan. 7, 1983). We hold that the CIT did not abuse its discretion in ordering suspension of discovery, and we also affirm its dismissal of Florsheim's complaint.

I

BACKGROUND

Florsheim is an American shoe manufacturer. It imports buffalo leather and goat and kid leather, not fancy, from India for use in its manufactures.

India has been designated by the President as a "beneficiary developing country" pursuant to the Generalized System of Preferences (GSP). The GSP is a trade program, established by Title V of the Trade Act of 1974,[2] which authorizes the President to provide duty-free treatment for eligible articles imported from qualifying developing nations for the purpose of promoting their economic development. In January 1977, the President placed buffalo leather on the list of articles eligible for duty-free treatment under the GSP. Executive Order No. 11960, 42 Fed. Reg. 4317. In February 1977, however, the President excluded buffalo leather imports from India from this preferential treatment. Executive Order No. 11974, 42 Fed. Reg. 11230A. Similarly, in March 1980, goat and kid leather, not fancy, were added to the list of GSP eligible articles, but Indian imports of these articles were denied duty-free entry. Executive Order No. 12204, 45 Fed. Reg. 20740. Executive Order No. 12204 also continued the denial of duty-free treatment for imports of buffalo leather from India. Executive Order No. 12302 (46 Fed. Reg. 19901), issued in April 1981, then continued the denial of duty-free treatment for imports of buffalo leather and goat and kid leather, not fancy, from India.

In 1979, Florsheim filed a petition with the United States Trade Representative (USTR) requesting the subdivision of item 121.55 of the Tariff Schedules of the United States (TSUS) to create a separate category for water buffalo leather. Florsheim also asked for duty-free treatment of Indian water buffalo leather pursuant to the GSP because "no like or directly competitive article" was produced in the United States as of January 3, 1975, the effective date of the Trade Act of 1974. *See* 15 C.F.R. § 2007. In July 1980, the USTR denied Florsheim's petition on the basis of its determination that an article directly competitive with water buffalo leather was produced in the United States as of January 3, 1975.

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[1] We too assume that Customs' denial of the protests was prompted by these Executive Orders. The record before us does not include copies of the notices of denial of Florsheim's protests which are required by statute to include a statement of the reasons for the denial. 19 U.S.C. § 1515(a). However, both parties and the Court of International Trade represent (implicitly, if not explicitly) that Customs' action was a direct consequence of the Executive Orders, and we rely on that representation.

[2] 88 Stat. 2066-2071, Pub. L. 93-618, 19 U.S.C. § 2461 *et seq.*

In 1980, Florsheim filed another petition with the USTR requesting duty-free treatment for water buffalo leather and goat and kid leather, not fancy, alleging that no like or directly competitive article was produced in the United States in January 1975. The USTR denied this second petition on June 11, 1981 on its finding that there was domestic production of goat and kid leather as well as production of calf leather, a product directly competitive with water buffalo leather.

Between September and December 1981, Florsheim filed several protests with the Customs Service disputing the classification of these Indian leather products as dutiable merchandise. The Customs Service denied those protests between October 1981 and February 1982. In April 1982, Florsheim filed its complaint with the CIT, seeking review of Customs' denial of the protests. In that suit, in October 1982, Florsheim served the Government with interrogatories and a request for production. Before responding to those discovery requests, the Government, in November 1982, moved to dismiss the action for failure to state a claim upon which relief could be granted. A short time later, the Government filed an additional motion, asking that the court suspend discovery pending decision on the motion to dismiss. The CIT granted such suspension in January 1983.

The CIT granted the Government's motion to dismiss and entered judgment dismissing the action in July 1983. From an analysis of Florsheim's complaint, the court identified the root of Florsheim's grievance as the President's Executive Orders denying the leather products duty-free treatment under the GSP. It addressed each of the three alleged grounds for the Government's motion:

> (1) Florsheim lacks standing to seek review of the Presidential action challenged by the complaint;
>
> (2) The President acted within his delegated authority under Section 504 (19 U.S.C. § 2464) in denying duty-free treatment to the leather merchandise; and
>
> (3) The President's action was not subject to judicial review, except to insure conformity with the President's delegated authority and compliance with the procedural prerequisites to taking action.

On the issue of standing, the court held that Florsheim had statutory standing under 28 U.S.C. § 2631(a) to contest the denial of its protests against the customs duty assessments on the goods it imported. The court also decided, however, that the President's action in limiting the application of duty-free treatment was within his delegated authority under Section 504 and that the court could not review the factual foundation for the President's action.

II

STANDING

We agree with the CIT that Florsheim has standing under 28 U.S.C. § 2631(a) to challenge the Customs Service's denial of its protests. That section confers standing on a person who files a protest pursuant to Section 514 of the Tariff Act of 1930 to bring a civil action (in the Court of International Trade) contesting the denial of the protest.[3] It provides:

> **§ 2631. Persons entitled to commence a civil action.**
>
> (a) A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protest pursuant to section 514 of such Act, or by a surety on the transaction which is the subject of the protest.

It is undisputed that Florsheim filed several protests with the Customs Service attacking the classification of Indian water buffalo leather and goat and kid leather, not fancy, as dutiable merchandise, and it is also undisputed that these protests were denied. There is nothing in the record before us to indicate, and the Government does not allege, that Florsheim failed to have standing to file a protest pursuant to Section 514 of the Tariff Act of 1930. That provision states, in relevant part:

> (a) Except as provided in [exceptions omitted as irrelevant] * * * decisions of the appropriate customs officer, *including the legality of all orders and findings entering into the same,* as to—
>
> * * * * * * *
>
> (2) the classification and rate and amount of duties chargeable;
>
> * * * * * * *
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *.
>
> * * * * * * *
>
> (c)(1) * * * Except as provided in [exceptions omitted as irrelevant] * * * protests may be filed with respect to merchandise

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[3] *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 22 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3729, 3733 ("Proposed section 2631 establishes standing requirements for those who commence a civil action in the Court of International Trade.")

> which is the subject of a decision specified in subsection (a) of this section by—
>
> (A) *the importers or consignees shown on the entry papers* * * *;
>
> (B) *any person paying any charge or exaction;* * * *

19 U.S.C. § 1514 (emphasis added). Florsheim is the domestic importer of the leather goods, and it also paid the duty on the entries that are the subject of its protests. Either one of these connections to the merchandise qualifies Florsheim, under the terms of the statute, to file a protest. As a party which properly filed protests with the Customs Service pursuant to Section 514 and whose protests were denied, Florsheim would seem to have standing pursuant to 28 U.S.C. § 2631(a) to challenge that denial in the CIT.

The Government contends, however, that "the existence of 28 U.S.C. § 2631 [and, presumably, Florsheim's meeting of its requirements] does not obviate the fact that Section 504's zone of interests does not encompass importers such as Florsheim." We understand the Government's argument to be that Section 2631(a) is not an implied grant of subject matter jurisdiction permitting, without more, judicial review of Customs' denial of *all* protests, no matter the administrative basis for them. We find it difficult to accept the Government's overriding premise as to the need for a proper protester also to be within some external "zone of interests," but even if we assume *arguendo* the correctness of that general position, Florsheim would still have standing to maintain this action because its interests are within the "zone of interests" of Section 504 (19 U.S.C. § 2464).

"Zone of interests" is a shorthand description of a test for standing, requiring that a complainant show that the interest it seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 153 (1970). *See also Valley Forge, supra,* 454 U.S. at 475; *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 100 n.6 (1979); *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 39 n.19 (1976).[4]

Section 504 of Title V of the Trade Act of 1974 (the Act), 19 U.S.C. § 2464, is entitled "Limitations of Preferential Treatment," and it describes the circumstances in which the President may or must limit duty-free treatment of eligible articles from beneficiary countries and the factors which go into that decision. It is incontestable that Congress was aware, when it enacted this legislation and the rest of Title V of the Act, that it was creating another layer of import duty regulations, and was thus regulating importers, who must pay the duties imposed. Those importers are directly interested in the working of the Act. This is more than sufficient, in itself, to bring Florsheim within the zone of interests of the Trade Act.

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[4] The "zone of interests" test is a non-constitutional prudential limitation on a court's exercise of jurisdiction in contrast to the mandatory Article III requirement that a would-be litigant demonstrate that it has suffered an actual injury which can be fairly traced to the challenged action and which is likely to be redressed by a favorable decision. *Valley Forge Christian College* v. *Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982). As an importer of the Indian leather at issue, Florsheim's financial interest in the action it challenges and the likelihood that a favorable decision would redress its injury (the paying of duties) are undisputed.

We note, moreover, that the regulatory scheme enacted pursuant to Title V of the Act (which includes, of course, Section 504) and to the related Executive Order 11846 (40 Fed. Reg. 14291, March 31, 1975)[5] established a system which invites and considers the opinions of importers on GSP policy. That system consists of a Trade Policy Staff Committee (TPSC) which prepares recommendations (reviewed by the USTR) for the President regarding whether (1) additional articles should be designated as eligible for the GSP; (2) duty-free treatment accorded to eligible articles should be withdrawn, suspended, or limited; or (3) product coverage should be otherwise modified. 15 C.F.R. § 2007.2. These recommendations are prompted by a request from an "interested party or foreign government" (or by the TPSC on its own motion) that present GSP policy be altered. The regulations define "an interested party" as covering:

> a party who has a significant economic interest in the subject matter of the request, or any other party representing a significant economic interest that would be materially affected by the action requested, such as a domestic producer of a like or directly competitive article, a *commercial importer* or retailer *of an article which is eligible for the GSP or for which such eligibility is requested.*

Id. § 2007.0(c) (emphasis added). The regulations go on to direct the petitioner to include in his request for designation of an additional article as eligible for the GSP information regarding, *inter alia,* "*How the GSP treatment would affect the petitioner's business* and the industry producing like or directly competitive articles in the United States * * * ." *Id.* § 2007.1(a)(4)(i) (emphasis added). Similarly, petitioners asking for withdrawal, suspension, or limitation of duty-free treatment are asked to include information on "*the effect imports receiving duty-free treatment under the GSP have on* competition and *the business of the interest on whose behalf the request is made* * * *." *Id.* § 2007.1(a)(5)(viii) (emphasis added). In other words, the regulations invite petitions from importers regarding GSP treatment and ask that they supply information on the impact of the requested or present policy on their specific business interests. Thus, the Government itself has acknowledged, in the regulations it promulgated pursuant to the statutory GSP scheme, that the interests of commercial importers, as well as others, are relevant to determining GSP policy and that it considers those interests in making recommendations to the President.

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[5] Executive Order 11846 conferred upon the Special Representative for Trade Negotiations the responsibility (in consultation with the Secretary of State) for administration of the GSP.

Finally, there is adequate evidence on the very face of the statute, especially Section 504(d) (19 U.S.C. § 2464(d)), that Congress intended to protect the interests of importers of goods entitled to preference. That section provides, *inter alia*, that compulsory withdrawal of duty-free treatment under the terms of Section 504(c) (19 U.S.C. § 2464(c)) is not required for articles for which no competitive product was produced in the United States in January 1975. *See* notes 11 and 12 *infra*, and accompanying text. The Government argues that this provision merely extinguishes the rights of entities seeking to compel the President to withdraw duty-free treatment pursuant to Section 504(c)(1)(B). In the Government's opinion, Section 504(d) is merely a defense which may be asserted by the President against those who demand that duty-free treatment must be denied according to the terms of Section 504(c)(1)(B)—but that no domestic importer has any litigable interest at all. The Government cites no authority for its interpretation of § 504(d), and we find no support for it in the legislative history or the implementation of that provision. In our view, the Government's reading is too narrow, and we agree with Florsheim that it is more reasonable to interpret § 504(d) as encompassing the interests of domestic importers. As pointed out by Florsheim, the entities that are benefited by § 504(d) and aggrieved by the President's failure to follow it are the beneficiary developing nation which exports the merchandise in question and the domestic importer.

For these various reasons, we hold that Florsheim can sue under 28 U.S.C. § 2631(a), and that its interests are "arguably within the zone of interests sought to be protected or regulated" by Section 504.[6]

III

Presidential Authority Under Section 504

Section 504, 19 U.S.C. § 2464, gives the President certain authority to end or withdraw duty-free treatment accorded under the GSP. In this case, the CIT read Florsheim's complaint, without dispute, as a charge that "the President improperly denied duty-free treatment to the subject merchandise under the competitive need formula of Section 504(c)(1)(B) because the USTR erred in his determination under Section 504(d) that articles like or directly competitive with the imported merchandise were produced in the United States on January 3, 1975." 570 F. Supp. at 738.[7]

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[6] The Government discusses the cases of *Colligan* v. *Activities Club of New York, Ltd.*, 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971), and *Peoples Gas, Light & Coke Co.* v. *United States Postal Service*, 658 F.2d 1182 (7th Cir. 1981), at some length. These cases are inapposite because they hold only that the plaintiffs were not within the zone of interests protected by the statutes under which they were suing, the Lanham Act (*Colligan*) and the Postal Reorganization Act (and other Postal Service legislation) (*Peoples Gas*). As the Government itself points out, the parameters of a statute's "zone of interests" vary from statute to statute and must be decided within the context of the particular statute.

We find it unnecessary, however, to reach the questions of the President's authority under Section 504(c)(1)(B) or of the alleged determinations under Section 504(d). Section 504(a) (19 U.S.C. § 2464(a)), another provision of Section 504 considered by the CIT below and invoked by the pertinent Executive Orders (*see* subpart D, *infra*), is sufficient authority, in itself, for the President's limitation here of preferential duty treatment. We therefore confine our consideration to that provision.

Section 504(a) declares (as it appears in Title 19, U.S.C.):

> The President may withdraw, suspend, or limit the application of the duty-free treatment accorded under section 2461 of this title with respect to any article or with respect to any country; except that no rate of duty may be established in respect of any article pursuant to this section other than the rate which would apply but for this subchapter. In taking any action under this subsection, the President shall consider the factors set forth in sections 2461 and 2462(c) of this title.[8]

A

We join the CIT in interpreting this subsection (a) as an explicit grant to the President of plenary authority—just as the statutory text indicates—to "withdraw, suspend, or limit" GSP duty-free treatment after consideration of the factors listed in Sections 501 and 502(c), *supra*. This broad, discretionary reading is fully supported by the legislative history. The House Report says with respect to the provision which became Section 504(a):

> The President would be authorized to withdraw, suspend, or limit preferences *at any time* with respect to any article or any beneficiary developing country. In taking such action, the President would be required to consider the factors taken into

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[7] Section 504(c)(1)(B) *requires* the President, if he determines that a certain specified standard has been met, to withdraw duty-free status, unless he nevertheless finds certain other listed facts or qualifications to exist. *See* note 10, *infra*. Subsection (d) of Section 504 declares (in part): "Subsection (c)(1)(B) of this section does not apply with respect to any eligible article if a like or directly competitive article is not produced on January 3, 1975, in the United States." *See* note 11, *infra*.

[8] Section 2461 [of Title 19, Section 501 of the Trade Act] lists the factors which go into the President's decision to provide duty-free treatment for eligible articles from a beneficiary developing country in the first instance. They are:

(1) The effect such action will have on furthering the economic development of developing countries;

(2) The extent to which other major developed countries are undertaking a comparable effort to assist developing countries by granting generalized references [sic] with respect to imports of products of such countries; and

(3) The anticipated impact of such action on United States producers of like or directly competitive products.

Section 2462(c) [of Title 19, Section 502(c) of the Trade Act] lists the factors which the President takes into account in determining whether to designate a country as a beneficiary developing country:

(1) An expression by such country of its desire to be so designated;

(2) The level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which he deems appropriate;

(3) Whether or not the other major developed countries are extending generalized preferential tariff treatment to such country; and

(4) The extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country.

> account in granting preferential treatment initially and in designating beneficiary countries. (Emphasis added.)

H.R. Rep. No. 571, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7355–56. In contrast, the next paragraph of the legislative history, describing the future Section 504(c), sharply limits the Executive's discretion:

> The President would be *required* to withdraw or suspend preferential treatment from any country which ceases to be eligible under the requirements of section 502(b) * * *. The competitive need formula is in general designed to provide an *express requirement governing the withdrawal or suspension of preferential treatment* in those cases where it can no longer be justified * * *.

Id. at 7356–57 (emphasis added).[9] Use of the term "may" (in Section 504(a)) in the phrase "The President may withdraw, suspend, or limit preferences * * *" likewise strongly indicates that Congress granted the President broad discretion to take the described actions. *See Southern Railroad Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979).

We must also bear in mind that the subject matter of Section 504 is intimately involved with foreign affairs, an area in which congressional authorizations of presidential power should be given a broad construction and not "hemmed in or 'cabined, cribbed, confined' by anxious judicial blinders." *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 334 F.2d 622, 632 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965).

Section 504(c)(1)(B) and 504(d) neither add to nor diminish the President's discretion under 504(a). Section 504(c)(1)(B), as mentioned above, is a *mandatory* provision, requiring that the President deny duty-free treatment when he determines that the imports meet the "competitive need formula"—unless he makes certain alternative findings.[10] Section 504(d) says only that

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[9] The House Conference Report also indicates that § 504(c) is a mandatory provision. It says plainly, "The House bill *terminates* preferential treatment for a particular article from a particular country * * * [when the competitive need formula is met (*see* note 10)]." H.R. No. 1644, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7367, 7398. The House bill originally provided that this limitation could be waived by the President for reasons of national interest, but the Senate proposed an amendment (which was adopted) "restrict[ing] the President's authority to waive * * * [the limitation] * * * [to certain specified circumstances (*see* note 10)]." *Id.*

[10] Section 504(c)(1) provides:

> Whenever the President determines that any country—
>
> (A) Has exported (directly or indirectly) to the United States during a calendar year a quantity of an eligible article having an appraised value in excess of an amount which bears the same ratio to $25,000,000 as the gross national product of the United States for the preceding calendar year, as determined by the Department of Commerce, bears to the gross national product of the United States for calendar year 1974, or
>
> (B) Except as provided in subsection (d) of this section, has exported (either directly or indirectly) to the United States a quantity of any eligible article equal to or exceeding 50 percent of the appraised value of the total imports of such article into the United States during any calendar year, then, not later than 90 days after the close of such calendar year, such country shall not be treated as a beneficiary developing country with respect to such article, except that, if before such 90th day, the President determines and publishes in the Federal Register that, with respect to such country—
>
> (i) There has been an historical preferential trade relationship between the United States and such country,
>
> (ii) There is a treaty or trade agreement in force covering economic relations between such country and the United States, and

Continued

§ 504(c)(1)(B) is inapplicable with respect to an eligible article if a competitive article was not produced in the United States on January 3, 1975 or if the dollar value of imports of that article falls below a certain level.[11] The provisions of this subsection (d) would be relevant only if we were to consider the president's authority under Section 504(c), which we do not do.[12] In short, subsection (a) is unaffected by subsections (c) and (d).

Florsheim then argues that, even so, Section 504(a) does not authorize the withdrawal of duty-free treatment from a *specific* article from a *particular* country. It maintains that, under that section, the President may delete a country from the list of beneficiary developing nations, *or* he may withdraw an article from the list of eligible articles. In other words, the President may only limit duty-free treatment for a particular article from all countries or for all articles from a particular country.

Florsheim's over-emphasis on the word "or" in Section 504(a) ("with respect to any article *or* with respect to any country" (emphasis added)) as restricting the President's power, leads to an interpretation of the President's authority that is at odds with the clause's overall provision that "the President may withdraw, suspend, or *limit* the application of the duty-free treatment * * * with respect to any article or with respect to any country * * * ." (Emphasis added.) The only (or at least the best) way by which the President can "limit" the application of duty-free treatment respecting a particular country is to exclude certain articles from that country from duty-free treatment. The same is true for limiting the application of duty-free treatment with respect to an article; that can be done by limiting the countries to which duty-free treatment is given for that article.

Florsheim's response that the word "limit"

> simply means that the President can restrict the quantity of a particular article which will be permitted duty-free treatment under the GSP when imported from all countries, or restrict the quantity of all duty-free articles imported from a particular beneficiary developing country

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[10] *Continued*

> (iii) Such country does not discriminate against, or impose unjustifiable or unreasonable barriers to, United States commerce,

then he may designate, or continue the designation of, such country as a beneficiary developing country with respect to such article.

[11] Section 504(d) provides:

> Subsection (c)(1)(B) of this section does not apply with respect to any eligible article if a like or directly competitive article is not produced on January 3, 1975, in the United States. The President may disregard subsection (c)(1)(B) of this section with respect to any eligible article if the appraised value of the total imports of such article into the United States during the preceding calendar year is not in excess of an amount which bears the same ratio to $1,000,000 as the gross national product of the United States for that calendar year, as determined by the Department of Commerce, bears to the gross national product of the United States for calendar year 1979.

[12] The legislative history of this subsection (d) (as well as its text) supports our view that it comes into play only when Section 504(c)(1)(B) is involved. That history discusses the future Section 504(d) solely in the context of the Section 504(c)(1)(B) competitive need formula, saying, merely, "The 50 percent ceiling would not apply in the case of articles where no like or directly competitive product is produced in the United States." H.R. Rep. No. 571, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7356.

is unacceptable. That restricted view of "limit," as simply giving the President the authority to impose quantitative limits on GSP treatment, would make the term "limit" superfluous. Section 504(a) already gives the President authority to "suspend" GSP treatment. If the President "limits" preferential treatment by setting a quota for the number of articles which will be permitted to enter the United States duty-free, he is effectively suspending duty-free treatment at a pre-determined point in time. On Florsheim's reading, "limit" would play no separate role at all.

Above all, we must remember that this is a statute giving broad discretionary authority to the President in a field trenching very closely upon foreign affairs and on our relations with other countries. Though an "or" in a statute may often call for a disjunctive interpretation, "this canon is not inexorable, for sometimes a strict grammatical construction will frustrate legislative intent." *United States* v. *Moore,* 613 F.2d 1029, 1040 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 954 (1980). Here, the completely disjunctive meaning of "or" ("any article" *or* "any country") which Florsheim stresses would clearly result in an unreasonable, overly narrow, and self-contradictory interpretation not suitable for a statute of this character. Words are not, after all, "pebbles in alien juxtaposition; they have only a communal existence * * * ." *National Labor Relations Board* v. *Federbush Co.,* 121 F.2d 954, 957 (2d Cir. 1941) (per L. Hand, J.).

B

Nor can we accept appellant's point that, if Section 504(a) is interpreted as empowering the President to take the action challenged here, the statute embodies an unconstitutional delegation of Congress' commerce power. In that connection we repeat that the subject matter of Section 504 involves foreign affairs, an area in which broad grants by Congress of discretion to the Executive are common. *See South Puerto Rico Sugar, supra,* 334 F.2d at 631–32 ("In the external sector of the national life, Congress does not ordinarily bind the President's hands so tightly that he cannot respond promptly to changing conditions or the fluctuating demands of foreign policy."). In this instance Congress has in fact circumscribed the President's discretionary authority under Section 504(a) with general guidelines for its exercise. Prior to taking action under that section, the President must consider the factors set forth in Sections 501 and 502(c). *See* note 8, *supra.* In addition, the President's authority under Section 504(a) is limited—although he may withdraw preferential treatment entirely, he may not adjust rates of duty. He is also required to report to Congress pursuant to Section 505. These restrictions are certainly adequate to insure that the statute is not an improper delegation of legislative authority. *See United States* v. *Yoshida International, Inc.,* 526 F.2d 560, 582–83 (CCPA 1975).

C

Once it is determined, as we have just done, that the President's exercise of his authority under Section 504(a) to limit duty-free treatment for these Indian leather goods was within his constitutionally delegated power, there is no further role for the CIT or for this court. Both Supreme Court and Court of Customs and Patent Appeals precedent have established that the Executive's decisions in the sphere of international trade are reviewable only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements. The President's findings of fact and the motivations for his action are not subject to review. *United States* v. *George S. Bush & Co.,* 310 U.S. 371, 379–80 (1940); *United States Cane Sugar Refiners' Association* v. *Block,* 683 F.2d 399, 404 (CCPA 1982); *Aimcee Wholesale Corp.* v. *United States,* 468 F.2d 202, 206 (CCPA 1972).

Although Section 504(a) prescribes certain factors that the President must consider in making his decision (*see* note 8, *supra*), these factors do not amount to a formula for the decision-making process which can be judicially reviewed. Although the President must consider these factors, he has discretion to ascertain their significance and is also at liberty to consider other, possibly countervailing, factors. As the Supreme Court noted in *United States* v. *George Bush, supra:*

> It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, *the judgment of the officer as to the existence of the facts calling for that action is not subject to review* [citations omitted] (emphasis added).

310 U.S. at 380. In short, the presidential decision is a "multifaceted judgmental decision," for which there is "no law to apply." *See Montgomery Ward & Co.* v. *Zenith Radio Corp.,* 673 F.2d 1254, 1262 (CCPA), *cert. denied,* 103 S. Ct. 256 (1982); *Cf. Citizens to Preserve Overton Park, Inc.,* v. *Volpe,* 401 U.S. 402, 410 (1971). After it is decided that the President has congressional authority for his action, "his motives, his reasoning, his finding of facts requiring the action, and his judgment, are immune from judicial scrutiny." *United States Cane Sugar Refiners' Association* v. *Block, supra,* 683 F.2d at 404.

D

Florsheim counters that, in any event, the foregoing principles are all inapplicable here because the President did not in fact act under the discretionary authority of Section 504(a) but only under Section 504(c)(1)(B), *supra,* a mandatory provision Congress also inserted in Section 504. We reject that position because the pertinent Executive Orders show on their face that they do invoke Section 504(a).

Executive Order No. 12302, issued on April 1, 1981 (prior to the entry date of 121 of the 122 entries that are the subject of this action) cites Section 504(a) as well as Section 504(c) as authority for the President's action. It reads, in pertinent part:

> By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including Title V of the Trade Act of 1974 * * * and as President of the United States of America, in order to modify, as provided by *Sections 504 (a) and (c) of the Trade Act of 1974* * * * the limitations on preferential treatment for eligible articles from countries designated as beneficiary developing countries * * * (emphasis added).

Likewise, Executive Order No. 12204, issued in March 1980, (which covers the first of the 122 entries) cites the President's authority under Title V of the Trade Act of 1974 (which, of course, includes Section 504(a)) in addition to its specific reference to Section 504(c). It reads:

> By virtue of the authority vested in me by the Constitution and statutes of the United States of America, *including Title V of the Trade Act of 1974* * * *, and as President of the United States of America, in order to modify, as provided by Section 504(c) of the Trade Act of 1974 * * * the limitations on preferential treatment for eligible articles from countries designated as beneficiary developing countries * * * (emphasis added).

Appellant contends that, nevertheless, Section 504(a) was not the "real" basis for the President's action; according to Florsheim, the President actually acted under Section 504(c)(1)(B). As one basis for this argument, Florsheim points out that Section 504(a) was not specifically cited as authority in the President's various Executive Orders concerning water buffalo leather and goat and kid leather, not fancy, until Executive Order 12302 was issued in April 1981. The prior Executive Orders which excluded these leather products from duty-free treatment (*see supra* Part I) cited Title V of the Trade Act of 1974 and also Section 504(c) as authority for the action.

It is sufficient, in order to show that Section 504(a) was invoked, that the pertinent Executive Orders cited that particular provision or (in the case of one entry) the portion of the Act that encompassed that provision. In *Cane Sugar, supra,* those appellants argued that the text of a presidential proclamation did not reflect the President's "real purpose" in issuing the proclamation and the actual source of authority for his action. The response made by the Court of Customs and Patent Appeals is appropriate here:

> [Appellant's] concentration on what it insists was the President's real purpose is simply irrelevant * * *. In sum, let the President's action be authorized, and let his action be within the authorizing provisions of the law he cites, and the role of the judiciary is at an end.

Id.; see also United States v. *Morgan,* 313 U.S. 409, 420, 422 (1941) ("It is not for us to try to penetrate the precise course of the Secretary's reasoning.") In this case, as in *Cane Sugar,* the courts may not go behind the Executive Orders to search for the "actual" basis for the President's action. The CIT was thus correct in refusing to ascertain whether the President's limitation of preferential treatment was "really" taken under Section 504(a) or whether the President believed he was acting pursuant to Section 504(c) alone.[13]

IV

SUSPENSION OF DISCOVERY

We now turn briefly to Florsheim's subsidiary contention that the CIT wrongfully granted the Government's motion to suspend discovery pending disposition of the motion to dismiss. Questions of the scope and conduct of discovery are, of course, committed to the discretion of the trial court. *Marroquin-Manriquez* v. *INS,* 699 F.2d 129, 134 (3d Cir. 1983). We find no abuse of that discretion here. The issues raised by the Government's motion to dismiss—Florsheim's standing, the President's authority under Section 504, and the court's scope of review over the Preident's exercise of that authority—are all questions of law for which factual discovery is not necessary or appropriate. Florsheim says that it wanted to prove conclusively through discovery that the "basis for the President's denial of duty-free treatment under the GSP was, as a matter of fact, Section 504(c)(1)(B), not Section 504(a)." But, as we have said *supra,* the CIT has no authority to look behind the Executive Orders. It was bound to take them at face value. As we have pointed out, the Executive Orders which cover the merchandise at issue, 12204 and 12302, both cite Section 504(a) as at least an alternative ground for the action taken. Executive Order 12302, which covers 121 of the 122 entries in question, cites Section 504(a) specifically, and Executive Order 12204, covering the first of the 122 entries, cites Title V of the Trade Act of 1974, which includes Section 504(a). That is quite enough.

On these grounds, both the CIT's order suspending discovery and its dismissal of Florsheim's complaint are *affirmed.*

AFFIRMED

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[13] We do not address Florsheim's claim that the CIT should have determined whether the proper factual predicate existed for presidential action under Section 504(c)(1)(B) (*i.e.,* whether the findings of the USTR relevant to Section 504(d) were correct or based upon a proper reading of the statute) because of our holding that Section 504(a), by itself, provides adequate authority for the President's action.

JARVIS CLARK CO., PLAINTIFF/APPELLANT v. UNITED STATES, DEFENDANT/APPELLEE

Appeal No. 83-1106

739 F.2d 628

(Decided July 17, 1984)

Edward N. Glad, of Los Angeles, California, argued for appellant.

Michael P. Maxwell, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge FORD.

ORDER

ON PETITION FOR REHEARING

Before KASHIWA and SMITH, *Circuit Judges*, and WISDOM,* *Senior Circuit Judge.*

WISDOM, *Senior Circuit Judge.*

The government's petition for rehearing is denied. The government's brief on petition for rehearing is full of sound and fury, but advances no argument that the court did not consider in its first decision.

The government again argues that the text and legislative history of the 1980 Customs Courts Act demonstrate no intent to modify the dual burden of proof. We think it manifests that 28 U.S.C. § 2643(b) was intended to do just that. For convenience we again quote the relevant statutory language and legislative history:

> (b) If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

28 U.S.C. § 2643(b) (Supp. V 1971).

> Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this remand power to the court, the Committee intends that the remand power be coextensive with that of a federal district

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*The Honorable John Minor Wisdom, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

> court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.
>
> Subsection (b) has particular impact on civil actions brought pursuant to section 515 or 516 of the Tariff Act of 1930. Under existing law, for example, in a civil action commenced under the court's jurisdiction to entertain cases involving the classification or valuation of merchandise, if the plaintiff succeeds in demonstrating that the original decision of the Customs Service was incorrect but is unable to establish the correct classification or valuation, the court dismisses the civil action. In effect, the court holds in favor of the United States even though the plaintiff has demonstrated that the challenged decision of the Customs Service was erroneous. Subsection (b) would permit the court in this situation to remand the matter to the Customs Service to make the correct decision or to schedule a retrial or rehearing so that the parties may introduce additional evidence.

House Report at 60–61, 1980 U.S. Code Cong. & Ad. News at 3772. In other words, when the trial court finds that the government's proposed classification is wrong but cannot determine the correct classification, it has three options: it may retry, rehear, or remand the case to find the correct answer. The government would interpret the statute as providing a fourth option: the trial court may, in its discretion, simply choose to reach an incorrect decision. This interpretation is at odds with the clear congressional intent. If § 2643 is to have the impact Congress intended, the trial court must consider whether the government's classification is correct, based on the evidence brought before it. In this case, we conclude that the plaintiff showed that the government was wrong, but did not clearly establish the correctness of its own classification. Following the mandate of § 2643 we remand the case to the trial court so that court can take the course best suited to determining the correct classification.[1]

The government also contends that our decision will upset the administration of the customs law. To the contrary, the abolition of the dual burden will add a stability to the customs laws that has been lacking. A judicial decision will now represent a statement of correct law, useful to future importers, rather than simply a narrow ruling based on the particular circumstances in the case.

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[1] The government also contends that our decision overrules not only the case mentioned in our original opinion but also *United States* v. *Arnold Pickle & Olive Co.*, *659 F.2d 1049* (CCPA 1981). In that case the court held that the government's method of valuation was incorrect but nevertheless reversed a judgment for the plaintiff because the plaintiff's method was incorrect as well. The court acknowledged, however, the propriety of rehearing or retrial under § 2643(b) "in appropriate circumstances". *Id.* at 1052 n.7. Because of the confused procedural posture of that case the court was not asked to define "appropriate circumstances" in its initial opinion; and, as the government acknowledges, the court later permitted the plaintiff to seek similar relief in the trial court. In the present case the plaintiff has explicitly made a focused attack on the dual burden of proof, and has provided persuasive authority to support its contentions.

We think it appropriate to caution both the government and private parties not to read more into our decision than is there. We do not at this time decide the extent to which res judicata and binding precedential effect should attach to classification decisions. Nor do we in any way weaken the requirement that a classification plaintiff overcome the presumption of correctness that attaches to a government classificaton. The burden is still on the plaintiff to prove the government's classification to be incorrect, and the court still decides this question on the basis of the evidence presented. As we noted in our original opinion, slip op. at 8, "ordinarily it will be difficult to meet this burden of proof without proposing a better classification." The best proof that a customs classification is wrong is proof that a different classification is right, or at least preferable. In the present case we conclude that were we forced to choose between the government's classification ("railway rolling stock") and the plaintiff's alternative ("extracting machinery") we would choose the latter. In such a case it defies common sense to hold that the government's classification must stand because another classification (the "basket" provision) not advanced by the plaintiff may be even better. But when a plaintiff cannot point to a more appropriate classification, only the most unusual circumstances would permit a court to conclude, on the basis of the evidence before it, that the plaintiff had overcome the presumption of correctness.

DENIED

V.G. NAHRGANG CO., F/A ANTHONY PAGLIALUNGO, APPELLANT v. UNITED STATES, APPELLEE

Appeal No. 84-678

741 F.2d 1363

(Decided August 16, 1984)

Steven P. Sonnenberg, of Chicago, Illinois, argued for appellant. With him on the brief was *Paul S. Anderson*.

Jerry P. Wiskin, of New York, New York, argued for appellee. With him on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Branch Director and *Joseph I. Liebman*, Attorney-in-Charge International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge NEWMAN.

Before FRIEDMAN, KASHIWA, and MILLER, *Circuit Judges*.

PER CURIAM.

This is an appeal from a judgment of the United States Court of International Trade (No. 81-4-00410) entered August 8, 1983. Appellant's motion for rehearing was denied on October 26, 1983. The trial court sustained United States Customs Service's classification of the articles under item 355.25 of the Tariff Schedules of the United States ("TSUS"). We affirm.

BACKGROUND

Nahrgang imported certain rolls of waterproofing material from Italy which were described in the invoices submitted to the Customs Service as "Paralon NT4" and "Paralon 77." The imported goods, which are used for roofing and other waterproofing applications, consist of a mastic composed of modified bitumen (a mixture of 70% by weight of bitumen and 30% by weight of various polypropylenes) and a nonwoven polyester fabric core. The nonwoven polyester fabric core (sold under the trade name "Trevira") used in the Paralon NT4 weighs 150 grams per square meter while the fabric used in the Paralon 77 weighs 130 grams per square meter. Other than bitumen, polypropylenes and polyester fabric, there are small quantities of other component materials in the merchandise which are not relevant to this case.

The imported goods are produced in the following manner. The mastic is first produced by mixing hot bitumen in a liquid state with the polypropylenes, and the resultant mixture is then formed into a membrane. After production of the mastic in the form of a membrane, the nonwoven polyester core is sunk into the mastic. The additional minor components in the products facilitate adhesion in their application and act as an antiadhesive to make the material easier to unroll.

The sole use of the Paralon products is for the waterproofing of roofs and other waterproofing applications. While bitumen alone has good waterproofing characteristics, polypropylene (a waterproof plastic material) is added to the bitumen as a modifying agent for the purpose of imparting flexibility to the mastic. The nonwoven polyester fabric core, not waterproof in itself, contributes tensile strength essential to an effective and "workable" waterproofing membrane. Additionally, the polyester fabric is used to obtain a waterproofing sheet in a continuous form in the fabrication process.

The Customs Service classified the Paralon articles under item 355.25 of the TSUS,[1] with duty assessed at the rate of 12 cents per pound plus 15 per centum ad valorem.

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[1] Item 355.25 states:

Schedule 3, Part 4, Subpart C—Wadding, Felts, and Articles Thereof: Fish Netting and Nets; Artists' Canvas; Coated or Filled Fabrics; Hose; Machine Clothing; Other Special Fabrics

* * * * * * *

Webs, wadding, batting, and nonwoven fabrics, including felts and bonded fabrics, and articles not specially provided for of any one or combination of these products, all the foregoing, of textile materials, whether or not coated or filled:

* * * * * * *

355.25 Of manmade fibers .... 12¢ per lb. + 15% ad val

LOWER COURT PROCEEDING

At trial, as well as here, Nahrgang asserted that the imported articles should have been classified under item 771.42 of the TSUS [2] because the articles are "wholly or almost wholly of * * * plastics." If Nahrgang's proposed classification is correct, then the Government's classification under item 355.25 is precluded by virtue of headnote 1(vii), Schedule 3, Part 4, Subpart C.[3] Nahrgang contended (1) that the essential character of the imported article is its waterproofing capability which is imparted by the mastic portion and (2) that the mastic portion is a "synthetic plastics material" as defined in headnote of Schedule 7, Part 12,[4] which in turn is further defined in headnote 2 of Schedule 4, Part 4, Subpart A.[5]

The lower court found:

> While I agree with plaintiff that the essential character of the merchandise is its waterproofing capability, plaintiff has failed to prove its claim that the mastic portion of the merchandise is a synthetic plastics material as defined in headnote 2 of Schedule 4, Part 4, Subpart A.
>
> Plaintiff's argument, essentially, is, that the mastic portion is a "synthetic plastics material" because bitumen constitutes an organic material and polypropylene is specifically mentioned in the headnote definition. Although the evidence shows that polypropylene was mixed with the bitumen as a modifier to impact flexibility to the mastic, neither the bitumen in itself

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[2] Item 771.42 states:

Schedule 7, Part 12, Subpart B—Rubber and Plastics Waste and Scrap; Rubber and Plastic Film Strips, Sheets, Plates, Slabs, Blocks, Filaments, Rods, Tubing and Other Profile Shapes

* * * * * * *

Film, strips, sheets, plates, blocks, filaments, rods, seamless tubing, and other profile shapes, all of the foregoing wholly or almost wholly of rubber or plastics:

* * * * * * *

Not of cellulosic plastics materials: Film strips, and sheets, all the foregoing which are flexible:

* * * * * * *

771.42 Other .... 6% ad val

[3] Headnote 1(vii) of Schedule 3, Part 4, Subpart C states:

1. The provisions of this subpart do not cover—

* * * * * * *

(vii) other articles specially provided for in schedule 7 or elsewhere.

[4] Headnote of Schedule 7, Part 12, states in pertinent part:

1. For the purpose of the tariff schedules—

* * * * * * *

(b) the term "plastics" refers to—
(i) synthetic plastics materials as defined in parts 1C and 4A of schedule 4.

* * * * * * *

(c) the term "rubber or plastics" means rubber, plastics, or combinations of rubber and plastics.

[5] Headnote 2 of Schedule 4, Part 4, Subpart A, states:

2. The term "synthetic plastics materials", in this subpart, embraces products formed by the condensation, polymerization or copolymerization of organic chemicals and to which an antioxidant, color, dispersing agent, emulsifier, extender, filler, pesticide, plasticizer, or stabilizer may have been added. These products contain as an essential ingredient an organic substance of high molecular weight; are capable, at some stage during processing into finished articles, of being molded or shaped by flow; and are solid in the finished articles. The term includes, but is not limited to, such products derived from esters of acrylic or methacrylic acid; vinyl acetate, vinyl chloride resins, polyvinyl alcohol, acetals, butyral, formal resins, polyvinyl ether and ester resins, and polyvinylidene chloride resins; urea and amino resins; polyethylene, polypropylene, and other polyalkene resins; siloxanes, silicones, and other organo-silicon resins; alkyl, acrylonitrile, allyl, and formaldehyde resins; and cellulosic plastics materials. These synthetic plastics materials may be in solid, semisolid, or liquid condition such as flakes, powders, pellets, granules, solutions, emulsions, and other basic crude forms not further processed.

nor the mastic material as a whole was established to be a synthetic plastics material. To fall within the definition of "synthetic plastics materials" in headnote 2, part 4A, Schedule 4, a material must be "formed by the condensation, polymerization or copolymerization of organic chemicals." But there is not a scintilla of evidence in the record to show that either the bitumen (which is 70 percent by weight of the mastic) itself or the mastic as a whole was formed by any of the specified processes.

Moreover, while headnote 2, Schedule 4, Part 4A provides that the term "synthetic plastics materials" includes products "derived from" polypropylene, the mastic (which is 70 percent by weight bitumen) obviously was not derived from polypropylene.

Since the record does not establish that the mastic portion of the merchandise is a plastics material, plaintiff has failed to demonstrate that the merchandise is almost wholly of plastics within the purview of the superior heading to item 771.42, TSUS. I further conclude that since the mastic is not plastics, as defined in the TSUS, the merchandise obviously is not "wholly" of plastics by virtue of headnote 5 of the Schedule 3.

Plaintiff's contention that the merchandise should be regarded as almost wholly of plastics, because it is allegedly in chief value of plastics, is untenable. Inasmuch as the essential character of the merchandise (viz., its waterproofing capability) is not imparted by a plastics material, the merchandise cannot be regarded as "almost wholly of" plastics, irrespective of the component material of chief value. Simply put, component material of chief value is not the criterion for determining whether an article is almost wholly of a named material under General Headnote 9(f)(iii). * * *

In any event, plaintiff failed to prove the component material of chief value of the Paralon 77. It is well settled that the proper method for determining the component material of chief value is to ascertain the costs of the separate component materials at the time they have reached the state when nothing further need be done except combine them into the completed article. [Footnotes and citations omitted.]

Accordingly, the lower court dismissed the complaint.

OPINION

I

Nahrgang primarily argues that the imported article is almost wholly of plastics. It contends that the trial court construed the term "plastics" too restrictively in that only those articles comprised solely of plastics are considered articles of plastics. Nahrgang asserts that, in construing the phrase "almost wholly of rubber or plastics" in item 771.42, an analysis must be made not only of the completed article (mastic) but also the separate components of the mastic (polypropylene, bitumen and fabric core). As characterized by Nahrgang, this contention relies on the principles of component material of chief value analysis.

The trial court clearly and correctly held that the chief value analysis does not apply to this question. Rather, in deciding whether a material is "almost wholly of plastics," the court must determine whether the essential character of the product is imparted by plastics. *See* n. 6, *infra.* The relative value of the component parts of the product has no bearing on this analysis.

Nahrgang contends that headnote 1(c) of Part 12, Schedule 7 defines the term "rubber or plastics" to mean "rubber, plastics, or combinations of rubber and plastics." *See* n. 4. It then argues, citing legislative history, that the phrase "combinations of rubber and plastics" should be liberally interpreted to mean a combination of plastics with any other materials, not just a combination composed of rubber and plastics. Since the mastic in the instant case is a combination of plastics (polypropylene) with other materials, Nahrgang asserts that the mastic is within that definition. We disagree.

Nothing in headnote 1(c) indicates or even suggests that Congress intended to include within the term "plastics" anything containing materials that were not plastics. The plain meaning of the headnote is that a combination of rubber with a plastic or of two or more plastic components will still constitute a plastic. The language does not provide that combining a plastic with a nonplastic substance other than rubber will produce a plastic. Headnote 1(c) deals only with the narrow form of combination and cannot properly be read as broadly treating as plastic any combination of plastics and nonplastics.

II

In addition to its argument that the mastic is a plastics material such that the imported article is almost wholly of plastics, Nahrgang contends that polypropylene alone imparts the essential character of the imported article, *i.e.*, the waterproofing capability, in that it is the only component that is completely indispensible to the finished product. As such, the imported article is "almost wholly of" plastics as defined by General Headnote 9(f)(iii).[6]

It is uncertain whether Nahrgang raised that issue with sufficient specificity in the Court of International Trade to entitle it to raise the issue here. In any event, we disagree with Nahrgang on the merits.

As found by the trial court, the essential character of the imported articles is its waterproofing capability. This waterproofing capability is the result of the combination of the two essential components of the products, *i.e.*, mastic (bitumen and polypropylene) and the Trevira fabric. The mastic, which is a mixture of bitumen and polypropylene, is 70% by weight of bitumen. Its essential character is not imparted by the polypropylene alone. The essential character of the article was addressed by several witnesses. For example, Mr. Noble, the Government's witness, testified:

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[6] General Headnote 9(f)(iii) states:

9. *Definitions*—For the purposes of the schedules, unless the context otherwise requires—

* * * * * * *

(f) the terms "of", "wholly of", "almost wholly of", "in part of" and "containing", when used between the description of an article and a material (e.g., "furniture *of* wood", "woven fabrics, *wholly of* cotton", etc.) have the following meanings:

* * * * * * *

(iii) "almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding the fact that significant quantitities of some other material or materials may be present; [Emphasis in original.]

> Q. Do you consider the Brai product, Exhibit G, to be an effective waterproofing material?
>
> A. Yes, I do.
>
> Q. What component, in your opinion, gives Brai the ability to be an effective waterproofing material?
>
> A. Asphalt, atactic polypropylene and polyester mat.
>
> * * * * * * *
>
> Q. What in your opinion is the essential characteristic of Exhibit G?
>
> A. Essential characteristic, it's a waterproofing membrane. It *takes all three components* to obtain that type of membrane.
>
> * * * * * * *
>
> Q. Are you able to characterize the Paralon NT 4 and Paralon 77 as belonging to any particular product class or kind?
>
> A. Yes.
>
> Q. Please do.
>
> A. It's modified bitumen one-ply roofing membrane.
>
> Q. Is the product classification which you just stated similar or different to that which you gave before for the Brai SP-4 in Exhibit G?
>
> A. It's the same. Both systems are modified bitumen atactic polypropylene. [Emphasis added.]

In addition to the fact that the essential character of the article is not imparted by the polypropylene alone, the imported articles are not considered to be plastic products even by the importer itself. This is evidenced by the fact that Nahrgang considers the imported articles as "modified asphalt membrane" and "thermoplastic resins modified asphalt" and not as plastics.

Moreover, bitumen, which is clearly not a plastic material in and of itself, has waterproofing abilities. The trial court also made the factual determination that: "The nonwoven polyester fabric core, although not waterproof in itself, contributed tensile strength essential to an effective and 'workable' waterproofing membrane."

Thus, the effective waterproofing capability of the Paralon products was accomplished by the presence of all three essential components of the Paralon products. Accordingly, the Paralon products did not obtain their essential character from the mastic or, for that matter, from the polypropylene plastics.

III

Last, Nahrgang argues that the imported articles should have been classified under item 771.42 due to the principle of similitude in conjunction with an examination of the applicable legislative history. Similitude is the concept that where an article is not specially provided for elsewhere in the statute, it is properly classifiable under that item which it most closely resembles as specified in the statute. *J. E. Bernard & Co.* v. *United States,* 53 CCPA 116 (1966).

Since the similitude issue was not raised below, we need not and do not consider it. *International Seaway Trading Corp.* v. *United States,* 488 F.2d 544 (CCPA 1973).

Conclusion

Nahrgang's claim under item 771.42, TSUS, was properly dismissed because it failed to prove that the imported articles were almost wholly of plastics as required by the superior heading to that provision. Accordingly, the judgment of the Court of International Trade is *affirmed.*

AFFIRMED

Miller, *Circuit Judge,* dissenting.

I respectfully dissent in view of *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878 (Fed. Cir. 1984). As in *Jarvis Clark,* the trial court in this case failed to consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Id.* I do not agree with the majority that the trial court sustained the Customs Service classification but believe, instead, that the trial court held that the Customs Service classification was not precluded in view of the fact that appellant failed to establish its claimed classification. Accordingly, I would reverse the decision of the Court of International Trade and remand for further consideration in light of *Jarvis Clark.*

Belcrest Linens, appellee *v.* United States, appellant

Appeal No. 84-734

741 F.2d 1368

(Decided August 21, 1984)

Joseph I. Liebman, of New York, New York, argued for appellant. With him on the brief were *Richard K. Willard,* Acting Assistant Attorney General, *David M. Cohen,* Director and *Saul Davis.*

Steven P. Florsheim, of New York, New York argued for appellee. With him on the brief was *Robert B. Silverman.*

Appealed from: U.S. Court of International Trade.
Judge Boe.

Before Friedman, Kashiwa, and Miller, *Circuit Judges.*

Kashiwa, *Circuit Judge.*

This is an appeal from a decision of the Court of International Trade holding that the imported merchandise, pillowcases, was a "product of Hong Kong" subject to an assessed duty rate of 34% ad valorem and not a "product of" the Peoples Republic of China which would cause the merchandise to be assessed with 90% ad valorem duty. We affirm.

Background

The parties stipulated to the following facts. The imported merchandise consists of pillowcases shipped from Hong Kong to the United States. The pillowcases were produced from percale, a cotton fabric, woven in China into a bolt of cotton. In China the bolts of fabric (piece goods) were stenciled with: (1) an embroidery design, (2) cutting marks, and (3) a scalloped edge. The piece goods were then embroidered on the embroidery design and shipped to Hong Kong. In Hong Kong the piece goods were cut into individual pieces of fabric at the inked cut marks. One edge of the fabric was cut and scalloped with colored thread on the inked scallop marks. The pieces were then folded in half and two of the sides were sewn together. The merchandise was then moistened with water and a whitener, pressed, folded, packaged, and sent to the United States. Appellee also stipulated that it had no knowledge of the time, cost or labor comparisons for the processes performed in Hong Kong and China; that it purchased the merchandise exported from China; and that it was unaware of any use of the merchandise other than to be made into pillowcases.

Upon importation into the United States, the pillowcases were classified under item 363.01 Tariff Schedules of the United States, such classification not being contested. However, pursuant to General Headnote 3(e) the merchandise was assessed at a column 2 duty rate of 90% ad valorem as a "product of" China, whereas appellee, the importer, asserts that the merchandise should be assessed at a column 1 duty rate of 34% ad valorem as a product of Hong Kong. The pertinent statutory provisions provide:

General Headnotes and Rules of Interpretation:

* * * * * * *

> 3. *Rates of Duty.* The rates of duty in the "Rates of Duty" columns numbered 1 and 2 of the schedules apply to articles imported into the customs territory of the United States as hereinafter provided in this headnote:

* * * * * * *

> (e) *Products of Communist Countries.* Notwithstanding any of the foregoing provisions of this headnote, the rates of duty shown in column numbered 2 shall apply to products, whether imported directly or indirectly, of the following countries and areas pursuant to section 401 of the Tariff Classification Act of 1962, to section 231 or 257(e)(2) of the Trade Expansion Act of 1962, or to action taken by the President thereunder:
>
> * * * * * * *
>
> China (any part of which may be under Communist domination or control).
>
> * * * * * * *
>
> (f) *Products of All Other Countries.* Products of all countries not previously mentioned in this headnote imported into the customs territory of the United States are subject to the rates of duty set forth in column numbered 1 of the schedules.

Relying on case law interpreting Section 5 of the Trade Agreement Extensions Act of 1951 and Presidential Proclamation 2935, 16 Fed. Reg. 7635, the predecessor provisions to General Headnote 3(e),[1] the trial court found that the imported merchandise was a product of Hong Kong. In reaching this conclusion, the court found that the processes performed in Hong Kong caused a change in the "character and identity" of the merchandise and that the pillowcases were articles "different in appearance, identity, and use" from the bolt of cloth. Despite the government's arguments, the court found decisions construing the marking statute, applying a "substantial transformation" test, and General Interpretive Rule 10(h) not to be controlling. The court, nevertheless, concluded that the change of identity and use of the subject merchandise as a result of its processing in Hong Kong, in fact, met the requirements of the substantial transformation test.

I

The only issue before us is whether the merchandise—pillowcases—imported into the United States is a "product of" China or a "product of" Hong Kong. While General Headnote 3(e) does not define the term "product of," it does refer to Section 231 of the Trade Expansion Act of 1962 and Section 405(a) of that Act defined

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[1] Section 5 of the Trade Agreements Extension Act of 1951 provided that:

> As soon as practicable, the President shall take such action as is necessary to suspend, withdraw or prevent the application of any reduction in any rate of duty, * * * to imports from the Union of Soviet Socialist Republics and to imports from any nation or area dominated or controlled by the foreign government or foreign organization controlling the World Communist movement.
>
> * * * * * * *

Presidential Proclamation 2935 implementing Section 5 provided that:

> * * * For the purposes of this part the term "imports from such nations and areas" *shall mean articles imported directly or indirectly into the United States from nations or areas specified in an effective notification, but shall not in any case include articles the growth, produce, or manufacture of any other nation or area.* (Emphasis added.)

Section 231 of the Trade Expansion Act of 1962, Pub. L. 82-794 provided that products of Communist countries would not be entitled to a reduced rate of duty. Section 257(e)(1) of that Act repealed Section 5 of the Trade Agreements Extension Act of 1951. However, Section 257(e)(2) of the Act provided that action taken by the President under Section 5 shall be considered as taken under Section 231.

"product of" a given nation as an article which is the "growth, produce or manufacture of such country or area."[2] Case law also establishes that the term "products of" at the least includes manufactured articles of such country or area, *United States* v. *Castle, Gottheil & Overton*, 5 Ct. Cust. Appls. 366 (1914) although it may in fact be a more inclusive term, *United States* v. *Samuel Dunkel & Co., Inc.*, 33 CCPA 60 (1945). Therefore, we agree with the first part of the government's argument, that for purposes of Headnote 3(e), the term "product of" refers to the "growth, produce or manufacture" of a given nation.

The government goes on to argue that the trial court erred in relying on case law interpreting Section 5 of the Trade Agreement Extension Act of 1951 and Presidential Proclamation 2935 implementing the Act, because the language of these provisions referred to "articles imported directly or indirectly" from a Communist nation rather than "products, whether imported directly or indirectly" of a Communist nation. The government contends that in determining whether a country is a "country of production" or "country of manufacture," country of origin criteria apply, and that in ascertaining whether an intermediary country where processes are performed on merchandise is the country of origin for tariff purposes, a "substantial transformation" of the merchandise must have occurred in the intermediary country. Therefore, the government contends that the trial court erred when it concluded that there was a change in the appearance, character, identity, and use of the merchandise in Hong Kong.

We, however, conclude that case law interpreting Presidential Proclamation 2935 is relevant. Although the proclamation did not refer to "products of" a Communist country, it did state that the higher rate would not apply to articles which were the "growth, produce or manufacture" of another area.[3]

The case most directly on point is *Chemo Pure Mfg. Co.* v. *United States*, 34 Cust. Ct. 8 (1954), wherein Chinese nutgalls were imported into the United Kingdom and processed into tannic acid. In holding that the United Kingdom was the country of exportation, the court stated:

> The merchandise here in question, in its condition as imported, is tannic acid, not nutgalls. The identity of the nutgalls, produced in China, has been lost, and a new product with a new name, a new use, and a distinct tariff status has been produced in the United Kingdom, the country of exportation. The imported tannic acid is, therefore, an article the growth, produce, or manufacture of the United Kingdom and dutiable as such.

34 Cust. Ct. at 11–12.

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[2] Section 231 was repealed by the Trade Act of 1974. Pub. L. 93-618. However, Section 401 of the Trade Act of 1974 retained the requirements of Section 231 and Section 601(8) of that act again defines a product of a country or area as "an article which is the growth, produce or manufacture of such area." 19 U.S.C. §§ 2451, 2481(8).

[3] *See supra* ftn. 1.

This test, that an article is the "growth, produce or manufacture" of an intermediary country if as a result of processes performed in that country a new article emerges with a new name, use or identity, is essentially the test used by the courts in determining whether an article is a manufacture of a given country under other areas of customs law. For example, in *Anheuser-Busch Association* v. *United States,* 207 U.S. 556 (1932), the Court held that certain corks imported from Spain into the United States where they were subjected to a cleansing process were not manufactured in the United States for purposes of the drawback provisions of Section 25 of the Tariff Act of 1850.[4] The Court recognized the difficulty of defining the term "manufacture" with specificity. The Court, however, went on to state:

> Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, * * *. There must be transformation; a new and different article must emerge, "having a distinctive name, character or use."

207 U.S. at 562.

While subsequent cases have recognized the fact that the term "produced in" may in fact encompass the processing of articles which do not rise to the level of "manufacturing," and while the Customs Service itself has recently stated that the above definition of manufacture is a restrictive one, C.S.D. 82-67, 16 Cust. Bull. 801 (1982), courts have been reluctant to lay down specific definitions in this area of the law other than to discuss the particular facts of cases under the particular tariff provisions involved. *See, e.g., Rolland Freres, Inc.* v. *United States,* 23 CCPA 81 (1935); *United States* v. *Samuel Dunkel & Co., Inc., supra.* We, therefore, cannot agree with the government that the trial court applied an incorrect legal standard when it concluded that the merchandise was a "product of" Hong Kong because the processes performed in Hong Kong changed the character, appearance, identity, and use of the merchandise from a bolt of woven fabric into a pillowcase.

The government also argues that the trial court erred when it failed to utilize the "substantially transformed" test as developed under other areas of customs law in determining whether the imported pillowcases were products of China or Hong Kong. Although we decline to advance a definition of this term for all purposes, particularly because the implementing regulations under various tariff provisions define the term differently,[5] it is clear that a "sub-

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[4] Section 25 of the Tariff Act of 1850 provided that:

> * * * where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback * * *.

[5] For example, the regulation under the Generalized System of Preferences General Headnote 3(c)ii, 19 U.S.C. § 1202, requires a constituent material to be "substantially transformed into a new and different article of commerce" for purposes of that provision. 19 CFR 10.117(a). Compare 19 CFR 134.d(1), implementing § 19 U.S.C.

Continued

stantial transformation" occurs when as a result of a process an article emerges, having a distinctive name, character or use, in essence the definition of manufacture quoted above. *See, e.g., Uniroyal, Inc.* v. *United States*, 542 F. Supp. 1026 (Ct. Int'l Trade 1982), *aff'd per curiam* 702 F.2d 1022 (Fed. Cir. 1983); *Texas Instruments, Inc.* v. *United States*, 681 F.2d 778 (CCPA 1982); *Midwood Industries, Inc.* v. *United States*, 64 Cust. Ct. 499 (1970). Again, it is difficult to perceive the difference between this test and that used by the trial court, that there was a change in the appearance, character, identity and use of the involved merchandise. Moreover, the trial court specifically concluded that the merchandise was substantially transformed in Hong Kong.

The government challenges this conclusion on the ground that in order for there to be "a substantial transformation" of the merchandise, the processes performed in Hong Kong must have changed the article into one with a new tariff identity. The government argues that this did not occur in this case because the processes performed in Hong Kong merely finished an identifiable product, unfinished pillowcases. Therefore, there was no "substantial transformation."

First, we note that the Government cites no case which stands for the proposition that a change in tariff identity is the sole criterion for determining whether a substantial transformation occurred. The Government relies heavily on the *Chemo* case which it otherwise criticizes the trial court for citing. However, in *Chemo*, a change in tariff identity was only one of the factors considered. Moreover, the Court of Customs and Patent Appeals has specifically stated that:

> While the fact that by a manufacturing effort expended on an article its tariff status may have been changed is a proper matter to consider along with other circumstances in arriving at a conclusion as to whether the article has been "manufactured or produced", it certainly should not be a controlling consideration.

Rolland Freres, Inc. v. *United States*, 25 CCPA 81 (1935).

Similarly, in the recent Customs Service decision 80-10, 14 Cust. Bull. 740, (1980), the question presented was whether Taiwan, where certain sweater parts were knit, or Hong Kong, where they were assembled, was the country of origin for tariff and marking purposes. In holding that Hong Kong was the country of origin, the Customs Service stated that the pertinent criteria for making this determination were whether a new and different article was created in Hong Kong, whether a new use resulted from the processing, and whether the article obtained a new identity. The decision went on to state:

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[3] *Continued*

1301(a), the marking statute, which provides that: "If an imported article will be used in manufacture, the manufacturer may be the 'ultimate purchaser' if he subjects the imported article to a process which results in a substantial transformation of the article even though the process may not result in a new or different article."

> In the instant situation, while all the components which account for the complete sweater or cardigan are produced in Taiwan and the unassembled garments would have the same tariff classification as the finished articles if imported into the United States together, this is not determinative of the country of origin of that merchandise. In *Doliff & Company, Inc.* v. *United States,* 81 Cust. Ct. 1, C.D. 4755 (July 7, 1978), the court stated that although certain processing did not result in a change in the tariff classification of the merchandise concerned, the processing did create a new and different article.

14 Cust. Bull. at 741.

The decision also stated that it was modifying a former ruling to reflect the position that the country where merchandise first becomes susceptible to its final tariff classification, whether assembled or unassembled, finished or unfinished, is a factor for consideration and not determinative in ascertaining country of origin of the merchandise.

We, therefore, cannot agree with the government's argument that the definitive issue in this case is whether the merchandise as it left China would be classified as unfinished pillowcases. Furthermore, we do not agree that in fact the articles were so dedicated to the use of pillowcases as they left China that they would be classified as unfinished pillowcases. There was evidence that the merchandise was capable of other commercial uses—woman's handbags and tops. *See, e.g., Avins Industrial Products Co.* v. *United States,* 515 F.2d 782 (CCPA 1975).

Finally, citing *Texas Instruments, Inc.* v. *United States,* 681 F.2d 778 (CCPA 1982), and *Uniroyal, Inc.* v. *United States,* 542 F. Supp. 1026 (Ct. Int'l Trade 1982), *aff'd per curiam* 702 F.2d 1022 (Fed. Cir. 1983), the Government contends that mere assembly operations do not constitute a substantial transformation. We, however, do not agree that the operations performed in Hong Kong were mere assembly operations. In determining whether the combining of parts or materials constitutes a substantial transformation, the issue has been the extent of the operations performed and whether the parts lose their identity and become an integral part of a new article. *See Adolphe Schwab, Inc.* v. *United States,* 62 Treas. Dec. 248, T.D. 45908 (1932), *aff'd,* 21 CCPA 116 (1983) (watch parts transformed into watches); *Carlson Industries,* 65 Cust. Ct. 474 (1970) (chair parts transformed into finished chairs).

For example, in *Uniroyal,* the trial court held that substantially complete shoes imported without outsoles were not substantially transformed by the attachment of outsoles. After stating that each case must be decided on its own particular facts, the court continued:

> Examining the facts in the present case, the conclusion is clear that a substantial transformation of the upper has not occurred since the attachment of the outsole to the upper is a

> minor manufacturing or combining process which leaves the identity of the upper intact. Thus the upper—which in its condition as imported is already a substantially complete shoe—is readily recognizable as a distinct item apart from the outsole to which it is attached. And the manufacturing process performed by Stride-Rite is a minor assembly operation which requires only a small fraction of the time and cost involved in producing the uppers.

542 F. Supp. at 1029–30.

In the case at bar, as opposed to that of *Uniroyal*, the processes performed in Hong Kong were not minor assembly operations which left the identity of the merchandise imported from China intact. The bolts of cloth were cut, the pieces were scalloped, and then sewn with decorative stitching, and the sides were sewn up. As the trial court found, the identity of the merchandise changed as did its character and use: embroidered fabric was transformed into pillowcases which are clearly distinguishable in character and use from the fabric of which they were made. We, therefore, hold that the trial court correctly concluded that the merchandise in this case was a product of Hong Kong.

AFFIRMED

BETHLEHEM STEEL CORPORATION, APPELLANT *v.* UNITED STATES, APPELLEE

Appeal No. 84–714

742 F.2d 1405

(Decided August 27, 1984)

Terence P. Stewart, of Washington, D.C., argued for appellant. With him on the brief were *Eugene L. Stewart, Paul W. Jameson* and *Mary Elizabeth Tuck*.

Curtis H. Barnette, General Counsel, *Meredith Hemphill, Jr.*, Assistant General Counsel, *Laird D. Patterson*, General Attorney and *Roger W. Robinson*, General Attorney, of Bethlehem, Pennsylvania, of counsel.

Francis J. Sailer, of Washington, D.C., argued for appellee. With him on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Velta A. Melnbrencis*, Assistant Director.

Appealed from: U.S. Court of International Trade.
Judge BOE.

Before DAVIS, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and MILLER, *Circuit Judge*.

DAVIS, *Circuit Judge*.

Bethlehem Steel Corporation (Bethlehem) appeals from a decision of the Court of International Trade (CIT), dismissing appellant's complaint against appellee United States (the Government) for lack of jurisdiction on the ground that the former's summons was not timely filed pursuant to 19 U.S.C. § 1516a(a)(2) (A)(i) and (B)(ii). *Bethlehem Steel Corp.* v. *United States*, 571 F. Supp. 1265 (CIT 1983). We reverse, holding that Bethlehem's summons was timely filed, and remand the case to the CIT for consideration on the merits.

I

In January 1982, five other American steel companies filed countervailing duty petitions with the Commerce Department's International Trade Administration (ITA). The petitions alleged, *inter alia*, that the manufacturers, producers, or exporters of certain Spanish steel products were receiving benefits from the Spanish Government which constituted subsidies.[1] Several days later, Bethlehem requested that the ITA include Bethlehem as a party to the investigative proceedings, pursuant to 19 C.F.R. § 355.7(i)(4). In February 1982, the ITA issued a notice of its determination to initiate countervailing duty investigations of nine carbon steel products from Spain. 47 Fed. Reg. 5753. In June 1982, the International Trade Commission (ITC) made a preliminary determination that there was a "reasonable indication" that six types of Spanish steel imports (of the nine types which were under investigation) were "materially injur[ing] or threaten[ing] * * * [to] material[ly] injur[e]" an American industry. 47 Fed. Reg. 26038.[2] In August 1982, the ITA published a notice of its "Preliminary Affirmative Countervailing Duty Determinations; Certain Steel Products from Spain". 47 Fed. Reg. 38161. That notice announced the ITA's preliminary determination that "there is reason to believe or suspect that certain benefits which constitute subsidies * * * are being provided to manufacturers, producers, or exporters in Spain of certain steel products * * *." The notice went on to identify three programs which the ITA had preliminarily found to confer benefits constituting subsidies on the six products still under investigation. It also reported the ITA's preliminary finding that the Desgravacion Fiscal a la Exportacion (DFE) program was not a subsidy because the amount of money it rebated to exporters was not excessive.[3]

Pursuant to 19 U.S.C. § 1671b(b), the ITA estimated the net amount of the subsidy it believed that manufacturers, producers, and exporters of the six products were receiving. It then directed the U.S. Customs Service to suspend liquidation of all entries from

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[1] The alleged benefits included the excessive remission of indirect taxes (the "DFE"), export credit insurance and premium rates, preferential loans, preferential loan guarantees, preferential export financing programs, capital grants, refinancing of existing debt, amendment of annual financial investment plans, exceptional credit for new investment, deferral of tax and social security benefits, and research and development funding.

The Department of Commerce and the International Trade Commission (ITC) share the responsibilities for a countervailing duty investigation. The ITA (as Commerce's delegatee) determines whether the manufacturers, producers, or exporters of the imported merchandise receive subsidies from their governments, and the ITC decides whether the subsidized imports are injuring or threatening to injure a domestic industry. (In certain circumstances, not applicable here, no injury determination is required.) *See* 19 U.S.C. § 1671, *et seq.*

[2] The ITC's determination ended the investigation as to the three types of steel imports as to which injury was *not* found. 19 U.S.C. § 1671b(a).

[3] Under the DFE, an exporter is given a sum of money at the time its merchandise is exported.

Spain of the six steel products under investigation and to require a cash deposit or the posting of a bond or security for each entry after the date of the notice of the preliminary affirmative determination. *See* 19 U.S.C. § 1671b(d).[4]

The ITA published its "Final Affirmative Countervailing Duty Determinations" on November 15, 1982. 47 Fed. Reg. 51438. In that notice the ITA determined that the three programs which it had preliminarily labeled as subsidies did, in fact, constitute subsidies. In addition, it found that two of the Spanish manufacturers, producers, and importers subject to the investigation were receiving countervailable cash grants. The notice also said that the ITA had determined that the DFE program (as well as other programs) did not constitute a subsidy.

As a result of that notice, the suspension of liquidation as to all six products from Spain was continued, cash deposits or bonds in specified amounts were required, the ITC was notified of the determinations, and the ITC's 45-day maximum time period for its final injury investigations began. The ITC notified the ITA of its final affirmative injury determination on December 21, 1982. 48 Fed. Reg. 51 (Jan. 3, 1983). It found that an American industry was "materially injured" as a result of imports of the six Spanish steel products. On January 3, 1983, the ITA issued countervailing duty orders covering all entries of the six products. 48 Fed. Reg. 51.

On January 7, 1983, Bethlehem filed a summons and complaint with the Court of International Trade challenging one aspect of the ITA's final determination on Spanish steel products—the finding that the DFE was not a subsidy. In September 1983, the CIT dismissed the action for lack of subject matter jurisdiction because the summons had not been, in the court's view, filed within the time limits specified by 19 U.S.C. § 1516a(a)(2) (A) and (B). Those subsections provide, in pertinent part:

> (2) Review of determinations on record—
>
> (A) In general.—Within thirty days after the date of publication in the Federal Register of—
>
> (i) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or
>
> (ii) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B), an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that

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[4] With respect to two of the six products, the ITA determined that "critical circumstances" were present and ordered that liquidation of all as-yet unliquidated entries of those two products should be suspended if they "entered, or [were] withdrawn from warehouse, for consumption" in the ninety-day period before the ITA's preliminary determination was published. *See* 19 U.S.C. § 1671b(e).

> court, contesting any factual findings or legal conclusions upon which the determination is based.
>
> (B) Reviewable determinations.—The determinations which may be contested under subparagraph (A) are as follows:
>
> (i) Final affirmative determinations by the Secretary and by the Commission under section 1303 of this title, or by the administering authority [the Commerce Department] and by the Commission under section 1671d or 1673d of this title.
>
> (ii) A final negative determination by the Secretary, the administering authority, or the Commission under section 1303, 1671d, or 1673d of this title.[5]

In the CIT's eyes, the ITA's findings regarding the DFE was a "final negative determination" within the meaning of 19 U.S.C. § 1516a(a)(2) (A)(i) and (B)(ii), *supra*, and could be reviewed by the CIT only if a summons were filed within thirty days of publication (November 15, 1982) of the ITA's final determination in the Federal Register. Bethlehem's summons, accordingly, was deemed untimely because it was filed beyond that thirty-day limit. The court rejected Bethlehem's contention that the DFE finding was merely a negative aspect of a "final affirmative determination" which should be appealed at a later time, after the countervailing duty order had been issued. *See* 19 U.S.C. § 1516a(a)(2) (A)(ii) and (B)(i). The court relied, instead, on the CIT opinion in *Republic Steel Corp.* v. *United States,* 4 CIT 17 (1982), which had held that the preliminary findings by the ITA that certain programs did not constitute subsidies were "negative determinations" and could be appealed immediately after their publication.

II

The statute distinguishes between a "final affirmative determination" and a "final negative determination" in countervailing duty matters, both in the procedural provisions for the administrative proceedings (19 U.S.C. § 1671d) and in the appeal provision just quoted (19 U.S.C. § 1516a(a)(2)(B)). Under that scheme, the question is whether the ITA's holding that the DFE was not a subsidy with respect to the products at issue was a "negative determination" in itself, or was merely one part or aspect of an overall "affirmative determination" that as a whole the affected products had been aided by subsidies. We agree with the latter position and also hold that Congress authorized (in 19 U.S.C. § 1516a(a)(2)(A)(ii) and § 1516a(a)(2)(B)(i), *supra*), domestic interests like Bethlehem to appeal, after publication of a countervailing duty order, from any adverse conclusion in such an overall "affirmative determination" lessening the amount of countervailing duties. Accordingly, Bethlehem's appeal here was timely.[6]

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[5] 19 U.S.C. §§ 1303 and 1671d deal with countervailing duty proceedings such as those involved here.

[6] On this appeal, both Bethlehem and the United States support this position.

The very form of the ITA's finding that the DFE program did not constitute a subsidy strongly tends to demonstrate that it was not an appealable "negative determination" in itself.[7] That particular finding was included towards the end of a long public notice entitled, "Final *Affirmative* Countervailing Duty Determinations; Certain Steel Products from Spain". 47 Fed. Reg. 51438 (November 15, 1982) (emphasis added). The notice began with a summary that reported only that the ITA had "determined that certain benefits which constitute subsidies are being provided to manufacturers, producers, or exporters in Spain of certain steel products * * *." The notice listed the four programs which the ITA had found to confer subsidies on the six products under investigation. The ITA found that all of the six products received some subsidy; it did not determine that any of the products received no subsidy at all. Consequently, liquidation of entries of all six imported products remained suspended and subject to the requirement of the posting of a cash deposit, bond, or security.[8]

The adverse impact on Bethlehem of the ITA's negative finding regarding DFE, included in the overall affirmative determination, was that the cash deposit, bond, or security which the importers were required to post—and the duties later assessed—would be smaller than if the ITA had found that the DFE was a subsidy and had included it in its conclusion as to the net subsidy received by each manufacturer, producer, or exporter of the six steel products. Thus, the amount of the proper countervailing duty was directly involved.

In this connection it is significant, in evaluating Bethlehem's right to question this "negative" conclusion on an appeal from the countervailing duty order, that the company would undoubtedly have such a right of appeal if the ITA had made the affirmative finding that the DFE was a subsidy but then underestimated its magnitude. In that comparable situation Bethlehem would be subject to exactly the same type of injury—lower deposit or security requirements and lower duties imposed on importers—and would likewise be complaining that the ITA had underestimated the duties owed.[9] In that instance, under the statute, an appeal would indisputably be from an affirmative determination and the time for appeal would indisputably be within 30 days after publication of the countervailing duty *order,* not the ITA's final administrative determination. In the light of the very close connection between Bethlehem's present case and this hypothetical one, it is difficult to believe that Congress provided that Bethlehem cannot wait until the countervailing duty order before challenging the amount of the duty rates (and the underlying negative finding on the DFE).

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[7] There is no indication that the form of this "Final Affirmative Countervailing Duty Determinations" was at all unusual.

[8] The suspension of liquidation and the requirement that bond be posted began after the ITA's preliminary affirmative determination. *See* Part I, *supra.*

[9] At least since enactment of the Trade Agreements Act of 1979, it has been clear that challenges to the amount of duty assessed are entitled to judicial review. *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 180–181 (1979). ("[U]nder present * * * [law] it is not clear whether a domestic manufacturer can challenge the *amount* of a dumping or countervailing duty assessment or only the total failure to assess such a duty. The * * * [new law] * * * would leave no doubt that judicial review may be sought on either basis".) (Emphasis in original.)

We are, of course, aware that the CIT has drawn a distinction between a challenge to a finding that a program does not constitute a subsidy and a challenge to the alleged undervaluing of an acknowledged subsidy. *See Allegheny Ludlum Steel Corp.* v. *United States,* slip op. 84-16 (CIT March 7, 1984); *United States Steel Corp.* v. *United States,* slip op. 83-65 (CIT June 28, 1983), *vacated,* slip op. 84-12 (CIT Feb. 24, 1984); *United States Steel Corp.* v. *United States,* slip op. 83-59 (CIT June 17, 1983), *vacated,* slip op. 84-12 (CIT Feb. 24, 1984). We need not now decide the propriety of making such a distinction *before* a countervailing duty order is published, so as, perhaps, to bar early complaints of undervaluing as premature. This distinction is, however, wholly artificial after the issuance, as here, of a countervailing duty order. At that point, whether the complaint is that the ITA has erroneously decided that one program is not a subsidy or whether it is that a subsidy has been undervalued, the essence of the attack is still the same—it is directed towards the *amount* of duties to be assessed. At least then, there is no reason to prohibit Bethlehem from challenging a countervailing duty order on the ground that the projected duty assessments do not take a particular subsidy into account,[10] when a challenge to projected duty assessments on the ground of inaccurate computation would clearly be permissible.

Moreover, to demand an earlier challenge by Bethlehem to the ITA's finding that the DFE was not a subsidy might well have called for a needless appeal before the countervailing duty order was published. At the time the ITA made its final determination, the ITC had not yet made final affirmative injury determinations for the products Bethlehem alleged were being subsidized by the DFE, and there was no legal requirement that an ITC determination be made within 30 days. *See* Part I, *supra.*

Although the ITA's notice was entitled "*Final* Affirmative Countervailing Duty Determinations * * *" (emphasis added), the determinations were final only in the sense that they reflected the *ITA's* final investigative findings on the question of subsidies. But in the context of the countervailing duty investigation as a whole, they were, as the Govenment has argued, only "interlocutory" in nature and effect. After the notice's issuance, there still remained one last requirement before a countervailing duty order could issue—the ITC's final injury determination. If the ITC had found no injury, the investigation would have been terminated, and no countervailing duty order would have been promulgated. The decision below requires, however, an interested domestic party to appeal from the ITA determinations even though shortly thereafter the whole question of duty assessment could become moot because the ITC found no domestic injury whatever. It is highly unlikely that Congress would call for such a potentially useless appeal. It is much more likely that Congress anticipated that the domestic interest could and would wait until after the countervailing duty order issued.

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[10] We disagree with the CIT's comments, in the opinion below, that Bethlehem was not "really" challenging the countervailing duty order because its complaint only disputed the ITA's finding on DFE, and that finding was not even mentioned in the countervailing duty order. It is true that Bethlehem's complaint was not that a countervailing duty order had been published; it was, however, contesting the rates of duties listed in that countervailing duty order, on the ground that they did not take into account the alleged DFE subsidy. The fact that the countervailing duty order did not explicitly mention the ITA's finding regarding the DFE program is of no significance. The order was squarely, though implicitly, based on that finding; without it, the duty rates assigned would have been greater.

The upshot of these considerations (textual, structural, and practical) is that the preferred interpretation of the provisions of 19 U.S.C. § 1516a(a)(2) (A) and (B), *supra*, is that (a) the ITA's conclusion as to the DFE was but one aspect of the overall affirmative determination and (b) Bethlehem could properly appeal, as it did, with respect to that DFE conclusion within 30 days after the countervailing duty order. In these circumstances that order triggered the appeal time. Only then did it become clear and definite that Bethlehem had a real complaint as to the ITA's DFE conclusion.[11]

III

Bethlehem has alternatively raised before us the possibility of harmonizing its position with earlier CIT cases upholding earlier appeals in comparable circumstances [12] on the basis that interested parties in Bethlehem's position have a statutory option as to the time to seek judicial review of negative aspects of a determination—after the determination, or after the countervailing duty order, or perhaps at both times. The Government, which, as we have pointed out, (n.6, *supra*) supports Bethlehem's stance that its appeal here was timely, strongly denies such an option. We do not accept Bethlehem's alternative position that an option always exists in cases of this type; under our reading of the statute Congress did not normally contemplate such a proliferation (and perhaps duplication) of appeals. But in rejecting the position that such an option always exists, we leave open the question whether there may possibly be occasions on which a negative subsidy finding can be severed from affirmative subsidy findings respecting the same product, and then judicially challenged on a separate, "interlocutory" basis. We do decide, however, that if such an earlier appeal is ever permissible, it could be taken only on the ground that Congress gave for specifically providing interlocutory appeals in the

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[11] Congress did explicitly provide, in defined situations, for appeals at an earlier stage of countervailing duty proceedings. *See, e.g.*, 19 U.S.C. § 1516a(a)(1)(B)(i) ("extraordinarily complicated" cases); 19 U.S.C. § 1516a(a)(1)(B)(ii) (preliminary determination of no subsidy). The premise for allowance of such earlier appeals is that the interested parties could otherwise suffer irreversible damage while the countervailing duty proceeding continued. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 245 (1979). In the present situation Congress provided no such earlier appeal, apparently because of the unlikelihood of serious injury to the domestic interested parties in the relatively short interim between the ITA's final determination and the countervailing duty order. Suspension of liquidation continued after the ITA's publication of its negative finding on DFE.

[12] *Republic Steel Corp.* v. *United States*, 4 CIT 17 (1982), *supra; United States Steel Corp.* v. *United States*, slip op. 83-59 (CIT June 17, 1983), *vacated*, slip op. 84-12 (CIT Feb. 24, 1984); *United States Steel Corp.* v. *United States*, slip op. 83-65 (CIT June 28, 1983), *vacated*, slip op. 84-12 (CIT Feb. 24, 1984).

Trade Agreements Act of 1979—*i.e.,* that delay "could make an ultimate resolution of an issue in a party's favor irrelevant because of the irreversible damage suffered during the interim period" S. Rep. No. 249, 96th Cong., 1st Sess. 245 (1979). On the record before us and Bethlehem's own contentions and actions, that is plainly not this case.

IV

We turn finally to the question of the effect of 28 U.S.C. § 2636(c) on 19 U.S.C. § 1516a, although the CIT did not cite 28 U.S.C. § 2636(c) as supporting its holding that Bethlehem's summons was untimely filed. That subsection provides:

> (c) A civil action contesting a reviewable determination listed in section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a], other than * * * [certain preliminary determinations], is barred unless commenced in accordance with the rules of the Court of International Trade *within thirty days after the date of the publication of such determination in the Federal Register.*

(Emphasis added.)

We have little difficulty reading 28 U.S.C. § 2636(c) together with 19 U.S.C. § 1516a, even though the latter provision says that final affirmative determinations may be challenged within thirty days of publication of the related countervailing duty order, and the former, quoted immediately *supra,* literally says that a challenge should be commenced within thirty days of publication of the determination itself.

These statutes are clearly *in pari materia.* The Customs Court Act of 1980 (of which 28 U.S.C. § 2636(c) is a part) and the Trade Agreements Act of 1979 (including 19 U.S.C. § 1516a) were companion measures concerning the administration of the countervailing duty and antidumping laws. In fact, the House Judiciary Committee, responsible for the Customs Court Act, worked closely with the House Ways and Means Subcommittee on Trade, which had been responsible for the Trade Agreements Act, in order to ensure that the two sets of legislative provisions did not conflict. *See* 126 Cong. Rec. 26,554 (1980). ("[T]he Judiciary Committee has engaged in a continuing dialog with the Ways and Means Committee's Subcommittee on Trade to assure that * * * [the bill (later incorporated into the Customs Court Act of 1980)] is consistent with their work in American foreign trade policy, particularly in the area of imports".)

Congress intended that 28 U.S.C. § 2636(c) should "substantially restate * * * the law set forth in section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a], as added by the Trade Agreements Act of 1979". H.R. Rep. No. 1235, 96th Cong., 2d Sess. 56, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3767. A provision declaring that challenges to final affirmative determinations must be taken prior to the issuance of a countervailing duty order would have constituted a substantial departure from the law set forth in 19 U.S.C. § 1516a(a)(2) (A)(ii) and (B)(i), and there is absolutely no reason to believe that Congress intended such a radical change. Indeed, the evidence points the other way. Congress amended 19 U.S.C. § 1516a only to the extent of shortening the time limits during which certain interlocutory challenges could be brought from thirty to ten days following publication of the determination. As stated in the Senate Report accompanying S. 1654 (the bill that became the Customs Court Act after amending its language to contain the text of the House bill):

> Proposed section 2636(c) [which became § 2636(d)] sets forth the time limits for instituting two types of civil actions which were first authorized by the Trade Agreements Act of 1979. While that Act authorized suit within 30 days, that period of time is far too long in light of the fact that the decisions to be reviewed * * * are decisions which in effect merely extend the time within which the agency may act. Therefore, section 2636(c) [§ 2636(d)] reduces the time period of 30 days provided for in the Trade Agreements Act of 1979 to 10 days.
>
> Proposed subsection 2636(d) [which was adopted as § 2636(c)] sets forth the time limit for the commencement of suit under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a]. *This subsection merely restates the provisions contained in section 516A of the Tariff Act of 1930.*

(Emphasis added.) S. Rep. No. 466, 96th Cong., 2d Sess. 17 (1979).

Against such strong indications that Congress intended merely to restate those aspects of 19 U.S.C. § 1516a which it did not explicitly change, we are unable to interpret 19 U.S.C. § 2636(c) as a repeal of 19 U.S.C. § 1516a(a)(2) (A)(ii) and (B)(i). Of course, repeals by implication are not favored. *FAA Administrator* v. *Robertson,* 422 U.S. 255, 265 (1975).

For these reasons, the CIT's decision, holding that Bethlehem's summons was untimely filed and dismissing Bethlehem's complaint, is *reversed,* and the case is *remanded* for consideration on the merits.

REVERSED AND REMANDED

Childcraft Education Corp., appellant v. United States, appellee

Appeal No. 83-1428

742 F.2d 1413

(Decided August 29, 1984)

Peter J. Fitch, of New York, New York, argued for appellant.

Judith M. Barzilay, of New York, New York, argued for appellee. With her on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge Landis.

Before Markey, *Chief Judge*, and Friedman and Rich, *Circuit Judges.*

Rich, *Circuit Judge.*

Appellant Childcraft Education Corp. (Childcraft) appeals from the decision of the Court of International Trade (CIT) which upheld the classification of the imported merchandise as toys, Item 737.90 of the Tariff Schedules of the United States (TSUS) instead of as "Machines not specially provided for," Item 678.50 TSUS, or "Electrical articles . . . not specially provided for," Item 688.40 TSUS, as claimed. We reverse.

Background

The imports are articles primarily used by children, and are respectively known as "Teaching Typewriters," "Touch to Learn," and "Touch and Match." The Teaching Typewriter requires the use of programmed cards, each of which presents a problem to be solved, such as a simple addition or word completion exercise. When a child presses the key or keys representing the correct answer, the card moves forward out of the machine. Additional programs teach vocabulary, phonograms, and mathematics; and progressively more difficult program cards are available for each of these subject categories. The Touch to Learn article operates on the same principle but uses a programmed cassette in place of the card, and a correct answer advances the cassette to the next problem. Available programs teach, for example, counting, telling time, addition, subtraction and multiplication. The Touch and Match article teaches reading readiness. It utilizes a card having an item appearing on its left side which a child must match with the corresponding item on the card's right side, by simultaneously pressing the appropriate buttons. This article is supplied with a blank card to enable teachers to create individualized exercises for children with specific learning problems. A correct choice causes the machine to produce a noise and light a light. None of these articles will function in its intended manner without the card or cassette programs.

The Customs Service classified these articles as toys, TSUS 737.90, and the CIT affirmed. The primary issue, as formulated by the CIT, and the affirmative determination which formed the basis for its upholding of the classification of these articles as toys, was whether their chief use was for the *amusement* of children and adults, rather than for the *education* of pre-school children. Childcraft contends on appeal that these articles are primarily used for educational purposes and, therefore, that TSUS 678.50 or 688.40 would be correct. The government conceded below and at argument before this court that if the merchandise is not classifiable under TSUS 737.90, that Childcraft's suggested classification in TSUS 678.50 would be proper.

OPINION

The meaning of terms, such as "toy," is a question of law. *Daw Industries, Inc.* v. *United States,* 714 F.2d 1140, 1141 (Fed. Cir. 1983). Both parties, as well as the CIT, relied upon the definition set forth in the TSUS (Schedule 7, part 5, subpart E, headnote 2) as adopted by a line of cases including *B. Shackman & Co.* v. *United States,* 67 Cust. Ct. 372, 380, C.D. 4300, (1971), that a toy is an article "chiefly used for the amusement of children or adults."

It is incumbent upon the importer in a case such as this to overcome the presumption of correctness which attaches to a classification by the Customs Service, and the importer has the burden of proving that the classification is incorrect, though the importer need not always prove that its own proposed classification is correct. *Jarvis Clark Co.* v. *United States,* 733 F.2d 873 (Fed. Cir. 1984).

Whether particular items, such as the articles at issue here, fit the definition of toy is a question of fact reviewed under the clearly erroneous standard. *Daw Industries,* 714 F.2d at 1142. A finding is " 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948). Thus, in order to prevail, Childcraft must demonstrate clear error in the CIT's finding, based on the record below, that the imported articles are chiefly used for amusement and are thus toys.

The evidence of record consists primarily of witness testimony, a photocopy of one of Childcraft's catalogs, the three imported articles, and the programmed cards and cassettes used with these articles. As the CIT opinion notes, only one witness testified, and that was Childcraft's Senior Vice-President of Merchandising. The government called no witnesses.

Childcraft's witness testified that his company was primarily engaged in selling teaching aids and school supplies, and that he worked with educational consultants, teachers, and others in the field of pre-school education. His further testimony was that approximately eighty percent of Childcraft's business was generated by sales to schools and educational systems. Additional testimony indicated that the machines could not function without their programmed cards or cassettes, and that particular programs were progressive in degree of learning difficulty. The imported articles were merchandised through school catalogs and by sales representatives who conducted workshops with school teachers to demonstrate the items. Other sales were generated by public distribution through retail stores.

Due to the nature of this case, our holding as to whether or not the subject articles are correctly classified as toys depends on the facts adduced below. Thus, the CIT correctly couched the determinative issue before us in terms set forth by the former Customs Court in *Ideal Toy Corp.* v. *United States,* 78 Cust. Ct. 28, 33, C.D. 4688 (1977):

> When amusement and utility become locked in controversy, the question becomes one of determining whether the amusement is incidental to the utilitarian purpose, or the utility purpose incidental to the amusement [citation omitted].

In finding that Childcraft "failed to demonstrate by the evidence of record that the imported merchandise is chiefly used for educational purposes and not chiefly used for the amusement of children," the CIT relied overmuch on certain comments by the witness that "he had observed children using the merchandise in school and that the children were enjoying themselves." The CIT erroneously found, from the following quoted testimony, an admission "that the basis [sic] of the merchandise was amusement of a young child with the hopeful purpose that the child would learn something while being amused." The quoted testimony was:

> Young children, unless they are really new, have ideas, and the environment [sic] around them every day is an adventure and anything at all might be—it the driest subject—an amusement to a child. But, I guess, as we grow older, we begin to be influenced [sic] by things that happen to us, and so maybe we learn to hate mathematics or we learn to—whatever. The fact is that anything mechanical would certainly 'amuse' somebody. It moves. Certainly, a young child—Well, there is nothing funny about it, nothing dances and there are no cymbals that are played, no music response. It was not a toy that you could turn into other things. It did simply one thing: it taught or attempted to teach a child a very rudimentary fact or facts for which it was intended, and anything will amuse a child, but I think that is a rather broad definition.

It is evident to us from this transcript excerpt that the witness stated only that the imported articles were not "funny," were not toys that could be turned "into other things" through play, and that they did one thing—i.e., "taught or attempted to teach" children. That the witness also recognized that "anything will amuse a child" is hardly persuasive, as found by the CIT, that the chief purpose of the article was amusement. Indeed, our review of this testimony, and the entire record, leads us to the opposite conclusion. In response to the question, "Would it be fair to say that if a child was not amused by such a device, they would just tend to ignore it?", the witness said "That holds true for everything." If a child disliked using the imported articles, it is reasonable to surmise that their use would be infrequent or less than optimally effective. Thus, we conclude that this testimony of the witness is not sufficient to support the CIT's finding as to the article's chief purpose.

Previous decisions by our predecessor court and the Customs Court help evaluate the witness' statements in a more useful, decision-making context. For example, in *United States* v. *Louis Wolf & Co.*, 26 CCPA 243, 249, C.D. 23 (1938), the court held that microscopes classified as toys were not toys.

> From the evidence in the case and the exhibits before us we think the merchandise at bar is not chiefly used for the *amusement* of children because, as we have hereinbefore stated, the interest which children display in the use of these microscope sets is not the character of "amusement" which a child gets from a toy or from an article which is essentially a plaything.

Devices known as "educational number learners" and "geometrical sorting boards" were held to be chiefly used for educational purposes in *B. Shackman & Co.,* supra. The evidence presented in *Shackman* indicated that the children using these items were "excited" rather than amused, and learned from them. See also the cases cited in *Shackman,* 67 Cust. Ct. at 381–383. Thus, mere amusement does not necessarily require a finding that an item's chief use is noneducational.

The testimony evidence presented in *Shackman* may have been more clear and compelling than that presented in the instant case, however. Unlike Childcraft, which presented one corporate witness, *Shackman* presented six witnesses, four of whom were experts in the field of education and the two others were involved in the importation, sale, and distribution of the imported articles. The CIT in the instant case did correctly recognize the premise that "importers, merchants and executives concerned with ordering, selling, distributing and promoting an article have to know the article's chief use and may properly give testimony as to such use." *Shackman,* 67 Cust. Ct. at 383; *see also, International Customs Service, Inc.* v. *United States,* 63 Cust. Ct. 255, 259, C.D. 3905 (1969) and *Novelty Import Co.* v. *United States,* 60 Cust. Ct. 574, 582, C.D. 3462, 285 F. Supp. 160 (1968). Yet the CIT erroneously discounted Childcraft's witness' uncontradicted testimony, in view of its finding based on his testimony, as discussed above.

The CIT also largely relied on Exhibit 5 in the case, which was a copy of Childcraft's 1971 Catalog entitled "Christmas Catalogue Toys That Teach." The CIT found that this catalog was "essentially a toy catalog the like of which is sent to retail outlets such as Gimbels and F.A.O. Schwartz Co., famous toy stores. Articles listed in this catalog appear to be only for the basic purpose of the amusement of children." While the CIT is correct in its observation that the fact that the "articles were marketed as toys, while not determinative, is of obvious probative value," citing *Montgomery Ward & Co.* v. *United States*, 62 Cust. Ct. 718, 724, C.D. 3853 (1969), Childcraft calls our attention to other aspects of the catalog which diminish its probative value. Among the other articles also included in the catalog were items which could not be classified as toys, such as furniture, play pens, musical instruments, flashlights, clocks, etc. Additionally, the advertising text accompanying the articles at issue describes each of them as a "teaching machine."

The type of catalog advertising present in the *Montgomery Ward* case is distinguishable from the Childcraft catalog, particularly in view of the fact that the former catalog listed the imported articles (toys musical instruments) in a special section, with an index "adding that '[o]nly toys are listed here* * *'." *Montgomery Ward*, 62, Cust. Ct. at 724. In contradistinction, Childcraft presents its imported articles as teaching machines, rather than as toys. Furthermore, the decision in *Montgomery Ward* was largely predicated on testimony that the imported articles were incapable of use for serious musical study, and the decision was further buttressed by a clear line of cases dealing with toy musical instruments.

In reaching our decision we give due deference to the CIT's statement that "in viewing a demonstration of the merchandise at trial and reviewing the exhibits in chambers [it] is of the solid conclusion that the main effect thereof is the amusement of children and any educational value is merely incidental thereto." However, the exhibit evidence of record, when considered in its entirety with the testimony of Childcraft's witness, does not support the CIT's finding that the chief use of the imported article is amusement.

To summarize, in view of Childcraft's proposed classification and the government's concession that this would be correct, we hold that the imported articles are properly classifiable under Item 678.50 TSUS, machines not specially provided for. The decision of the CIT is *reversed*.

REVERSED

Beloit Corp., complainant-appellant *v.* Valmet Oy, TVW Paper Machines, Inc., U.S. International Trade Commission, appellees

Appeal No. 84-1296

742 F.2d 1421

William C. Streeber and *Steven H. Noll*, of Chicago, Illinois representing appellant.

Victor M. Wigman and *Ralph Elsas-Patrick*, of Arlington, Virginia, representing appellant.

Myron Cohen, of New York, New York, representing appellee.

Thomas C. Pontani, *Lawrence G. Kurkland* and *Martin Pavane*, of New York, New York, of counsel.

Phyllis N. Smithey, of Washington, D.C., representing International Trade Commission.

Michael H. Stein and *Michael P. Mabile*, of Washington, D.C., of counsel.

Appealed from: U.S. International Trade Commission.

Before **Markey**, *Chief Judge*, **Friedman** and **Rich**, *Circuit Judges*.

ORDER

Beloit filed this appeal "solely on the issue of non-infringement". On 21 June 1984, in an unpublished order, this court denied Valmet's motion to dismiss the appeal. Beloit and the International Trade Commission (Commission) have moved under this court's Rule 18(a) for publication of the order so that it may have precedential value. The latter motion is granted and the order is, with modification, herewith issued for publication.

BACKGROUND

Valmet moved for dismissal because Beloit appealed "solely on the issue of non-infringement". Valmet says Beloit should file a new notice of appeal on the issue of "no violation", thereby enabling Valmet to argue error in what it calls the "Commission's findings" that the patent in issue was not anticipated under 35 U.S.C. 102, that the invention would not have been obvious under 35 U.S.C. 103, and that Valmet's activities tend to injure a domestic industry.

In arguing that the Commission could only adopt the Presiding Officer's determination in its entirety, Valmet quotes one of the two sentences in the Commission's "Notice of Commission Decision Not to Review Initial Determination". In those sentences the Commission said it "determined not to review" the Presiding Officer's

Initial Determination. Valmet cites the Commission's Rule 210.53(h):

> [h] *Effect.* An initial determination should become the determination of the Commission thirty (30) days after the service thereof, unless the Commission, within thirty (30) days after the date of filing of the initial determination, shall have ordered review of the initial determination or certain issues therein pursuant to § 210.54(b) or § 210.55, or by order shall have changed the effective date of the initial determination.

Valmet says the rule makes the Presiding Officer's Initial Determination that of the Commission. Presumably on that premise, Valmet felt comfortable in referring to the Presiding Officer's findings on §§ 102, 103, and injury as "findings of the Commission". On that premise also, Valmet bases its assertion that Beloit must appeal the basic conclusion of "no violation" and must not be permitted to limit the appeal to the infringement issue.

DISCUSSION

Valmet's difficulty is three-fold: (1) The Commission's Notice is equivocal; (2) the rule does not say what Valmet wishes it said, and (3) regardless of how an appeal is labeled, neither Beloit nor any other appellant may appeal issues on which it prevailed before the trial tribunal.

(1)

In addition to the statement that it had determined *not* to review the Initial Determination, the Commission's Notice contained this statement:

> The Commission has adopted that portion of the presiding officer's ID relating to the noninfringement of U.S. Letters Patent 3,726,758. The Commission has taken no position on the other issues discussed in the ID, since the findings and conclusions of the presiding officer regarding noninfringement are dispositive of the question of whether there is a violation of section 337.

Whatever had been meant by the "not to review" statement, it can hardly be said that the Commission made "findings" on issues upon which it specifically stated it had "taken no position". Nor is it appropriate to assume that the Commission has adopted all findings of its presiding officer when it specified that it had adopted "that portion" of the Initial Determination relating to non-infringement.

(2)

The Commission's Rule 210.53(h) *supra,* says that the Initial Determination becomes that of the Commission unless it has ordered review of "certain issues" in that determination. Whether it "ordered" review of the non-infringement issue here is unclear but irrelevant. It clearly did review and decided to adopt that portion of the Initial Determination dealing with that certain issue.

Moreover, the Commission is not incapable of announcing its adoption of an entire Initial Determination when it so intends. *See, Certain Amino Acid Formulations; Commission Decision Not to Review Initial Determination,* 48 *Federal Register* 31306 (July 7, 1983). If Valmet's view of the rule were correct, no need for such announcement would exist.

(3)

Most importantly, this court does not sit to review what the Commission has not decided. Nor will it review determinations of presiding officers on which the Commission has not elected to provide the court with its views. The court has not been constituted a "Surrogate Commission" to review portions of a presiding officer's determination on which the Commission has "taken no position".

The Commission, on the other hand, is at perfect liberty to reach a "no violation" determination on a single dispositive issue. That approach may often save the Commission, the parties, and this court substantial unnecessary effort. Like many good things, that approach carries with it a risk—here the risk of a reversal, and a consequent need for the Commission to revisit one or more portions of the initial determination on which it had taken no position.

The Commission should not be precluded from taking that risk, however, and, where the conclusion reached on one dispositive issue appears to it inevitable and unassailable, the risk would appear reduced to an acceptable level. Unlike the risk that parties, witnesses, and exhibits may have to return for a renewed trial (*e.g.,* when a district court chooses in a patent case to decide only the validity or only the infringement issue), the risk of reversal here entails only the Commission's review of remaining portions of the Initial Determination.

The Commission's judicious use of a single dispositive issue approach in issuing final negative § 337 determinations can not only save the parties, the Commission, and this court unnecessary cost and effort, it can greatly ease the burden on a Commission commonly faced with a § 337 proceeding involving numerous complex issues and required by statute to reach its conclusion within rigid time limits.

In *Coleco Industries, Inc.* v. *United States International Trade Commission,* 573 F.2d 1247, 1252, 197 USPQ 472, 476 (CCPA 1978), one of our predecessor courts stated in footnote 5:

> Because the Commission made no decision on the validity issue, it is not before us. To obviate a remand on validity, in the event of a reversal of a finding of non-infringement, it would be advisable for the Commission to render a decision on all appealable issues presented to it.

In that footnote, the court again affirmed the basic rule that issues not decided by the Commission cannot be presented to the court. Though the court indicated that remand was avoidable by a decision on all issues, it imposed no requirement that the Commission seek to avoid the risk of remand. In light of the Commission's expertise and the time constraints under which it must function, imposition of a requirement that it decide all issues in every § 337 proceeding would be intolerable.

It is important, also, that the parties to appeals in this court limit the issues to those decided by the Commission. Uncertainty regarding issues to be reviewed renders uncertain the content of briefs and appendices and can result in the inclusion of unnecessary material in appendices with accompanying wasteful expense. It can also result in delay of the appeal while the court is required to resolve motions to strike and, as here, motions to dismiss.

An appellee is at liberty to support an appealed judgment by any argument supported in the record, and to cross-appeal if adversely affected by the appealed judgment in some particular which it seeks to have modified. An appellee is not at liberty, however, to argue before this court an issue not decided by the trial tribunal.

In the present case, Beloit appealed "solely on the issue of non-infringement" because that was all of the Presiding Officer's determination the Commission said it was deciding and because Beloit was adversely affected only by the Commission's adoption of that determination portion. Beloit won its case before the Presiding Officer on the other three issues and, no matter how it labeled the appeal, it could not have appealed those issues if the Commission had adopted the entire determination. Similarly, Valmet won on the basic and dispositive "no violation" decision and has no basis whatever for appeal. Though Valmet lost on the validity and injury issues before the presiding officer, the Commission took no position on them and they are therefore not available to Valmet as a basis for appeal or cross-appeal.

Valmet obviously desires to argue before us the validity and injury issues as insurance against the possibility of our reversing the "no-infringement" finding adopted by the Commission. That desire, and the back-door appeal it would create, are premature. If this court affirms on "no-infringement", the litigation ends (absent grant of certiorari) favorably to Valmet. If this court reverses on that issue, and if on remand the Commission adopts the portions of the Initial Determination relating to the validity and injury issues, Valmet may appeal that decision to this court at that time.

ORDER

The motion to dismiss the appeal is accordingly denied.
Dated: August 31, 1984.

HOWARD T. MARKEY,
Chief Judge.

ATLANTIC SUGAR, LTD., ET AL., APPELLEES *v.* UNITED STATES AND AMSTAR CORPORATION, APPELLANTS

Appeal Nos. 84-692/84-709

744 F.2d 1556

(Decided September 25, 1984)

Michael H. Stein, of Washington, D.C., argued for appellant. With him on th brief were *Michael P. Mabile,* Assistant General counsel and *William E. Perry.*

Thomas P. Ondeck, of Washington, D.C., argued for appellant, Amstar Corpora tion. With him on the brief was *B. Thomas Peele.*

Roger D. Chesley, of Washington, D.C., of counsel.

Roger A. Clark, of Washington, D.C., argued for appellee. With him on the brie was *Robert V. McIntyre.*

Appealed from: U.S. Court of International Trade.
Judge WATSON.

Before MILLER, *Circuit Judge,* COWEN, *Senior Circuit Judge,* and SMITH, *Circuit Judge.*

SMITH, *Circuit Judge.*

In this antidumping case, appellants, the United States (Government) and Amstar Corporation (Amstar), appeal from a Court of International Trade decision reversing an affirmative determination by the U.S. International Trade Commission (ITC) of regional industry injury, and vacating the resulting antidumping order. We reverse and reinstate the antidumping order.

ISSUES

We address two issues: (1) whether the lower court erred as a matter of law in holding that the aggregate data for Revere Sugar Corporation (Revere) did not constitute "best information available";[1] and (2) whether the lower court erred in finding that the ITC injury determination was unsupported by substantial evidence on the record.

BACKGROUND

We have before us the most recent[2] of five Court of International Trade decisions[3] concerning this Canadian sugar antidumping case. The case began in March 1979 when United States sugar producer Amstar filed an antidumping petition with the U.S. Treasury Department, alleging injury by reason of "dumped" imports of Canadian sugar (imports sold at less than fair value) and requesting relief in the form of antidumping duties on those imports.[4] Treasury exercised its right, under the law then in effect, to refer the case to the ITC for a preliminary injury assessment. In May 1979 the ITC determined that sufficient evidence of injury existed to warrant Treasury's continued investigation of the alleged dumping. In reaching this determination the ITC focused on data for injury to a regional, as opposed to a nationwide, sugar industry located in the Northeastern/Great Lakes area.

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[1] 19 U.S.C. § 1677e(b) (1982) set forth in opinion *infra.* All section references are to Title 19, U.S.C. (1982), except where otherwise indicated.

[2] *Atlantic Sugar, Ltd.* v. *United States,* 573 F. Supp. 1142 (Ct. Int'l Trade 1983) (*Atlantic Sugar V*).

[3] *See* previous Court of International Trade opinions of same title as n.2 found at 553 F. Supp. 1055 (1982) (*Atlantic Sugar IV*); 2 Ct. Int'l Trade 295 (1981) (*Atlantic Sugar III*); 519 F. Supp. 916 (1981) (*Atlantic Sugar II*); 511 F. Supp. 819 (1981) (*Atlantic Sugar I*).

In early November 1979 Treasury found sales at less than fair value, with dumping margins on the Canadian sugar of approximately 20 percent. Consequently, the ITC promptly instituted its final injury investigation. Then on January 1, 1980, the Trade Agreements Act of 1979 [5] became effective, providing 75 days for the ITC to make a final material injury determination in any pending antidumping case.[6] More importantly, the new law specified precisely the criteria which the ITC was to apply in defining a regional industry: [7]

(C) Regional industries.

> In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if—
>
> > (i) the producers within such market sell all or almost all of their production of the like product in question in that market, and
> >
> > (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.
>
> In such appropriate circumstances, material injury * * * of an industry may be found to exist with respect to an industry * * * if there is a concentration of * * * dumped imports into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured * * * by reason of the * * * dumped imports.

During the final injury investigatory period the ITC staff endeavored to collect the extensive data necessary to determine whether a northeastern states' sugar industry existed which satisfied the above new, strict statutory definition, and, if so, what should be the scope of the region. This involved, among many other things, mailing questionnaires to the seven sugar producers in the suspected region, including the second largest, Revere. Revere's questionnaire, dated January 7, 1980, showed that Revere had three plants, located in Brooklyn, Boston, and Chicago. Revere gave the ITC confidential firm-wide data (*i.e.*, aggregated for all three plants) covering such information as Revere's production, sales, distribution of net sales (broken out by northeastern as opposed to other states), and profit-and-loss and other financial data.

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[4] Amstar filed under the then-applicable statute, the Antidumping Act of 1921, as amended (§§ 160 *et seq.* (repealed effective Jan. 1, 1980)), which provided for investigation of alleged less-than-fair-value imports by the Treasury Department. The ITC conducted the parallel injury investigation, as it does under current law. §§ 1673 *et seq.* Both investigations must result in affirmative determinations in order for the United States petitioner to receive the requested relief.

[5] Pub. L. No. 96–39, 93 Stat. 144, 162, repealing the Antidumping Act of 1921 (§§ 160 *et seq.*) and amending the Tariff Act of 1930 to insert the new antidumping statute at §§ 1673 *et seq.*

[6] Section 102 of Pub. L. No. 96–39, set forth at § 1671.

[7] Section 1677(4)(C).

By the end of January 1980 the ITC staff, in its report containing preliminary findings of fact, proposed an 11-state northeastern area excluding Illinois and Maryland. This meant that Revere's Chicago plant would be excluded from the region, as well as the Baltimore and Chicago plants of the proposed region's largest producer, Amstar. The ITC staff then worked with Amstar to segregate its data to exclude its plants outside the region. The staff did not do this with Revere, but toward the end of the investigatory period the principal staff investigator did telephone Revere to inquire about individual plant data. According to an affidavit by that investigator, Revere officials told him that "separate data on individual plant operations were not readily available." He also stated that Revere's president told him that the Chicago operation was "relatively minor" compared with the Boston and Brooklyn operations and that the Chicago operations were "not significantly different" from those of the other two plants.

The ITC staff presented its final report to the commissioners, and on March 6, 1980, they unanimously determined that an industry in the United States was being materially injured by reason of imports of sugars and syrups from Canada, which Treasury had determined to be sold in the United States at less than fair value. The commissioners defined the sugar "industry" according to the new statutory criteria and as recommended by the staff—the 11-state northeastern area. However, in the data on which the commissioners based their decision were the firmwide Revere figures, which included the extra-regional Chicago plant. In *Atlantic Sugar V* the Court of International Trade held inclusion of the Chicago plant data to be contrary to law and to cause the ITC's final injury determination to be unsupported by substantial evidence, resulting in that court's vacating the final antidumping order. We review these aspects of that court's decision.[8]

OPINION

The statute specifies that the standard of judicial review of a final ITC material injury determination in an antidumping case is whether that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[9] We therefore apply the substantial evidence standard in reviewing the ITC's factual determination that an industry in the United

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[8] We do not review the various other issues which that court addressed in *Atlantic Sugar I, II, III, IV, and V,* and which the parties have not here appealed, except that we do note some points where relevant.

[9] Section 1516a(b)(1)(B).

States was materially injured by reason of Canadian sugar sold in the United States at less than its fair value.[10] We address first, however, the alleged error of law concerning the trial court's rejection of the aggregate data for Revere's three plants as not in accordance with law.

1. *Best Information Otherwise Available*

The Government and Amstar contend that the ITC did not err in including the Chicago plant data in its injury determination, because the aggregate Revere data was the "best information otherwise available," as allowed by statute: [11]

> (b) Determinations to be made on best information available
>
> In making their determinations under this subtitle, the * * * Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

Atlantic Sugar, a Canadian sugar producer, counters that the ITC should not benefit from the best information available rule because, to summarize, it was the ITC's own fault that Revere was "unable to produce [the] information requested in a timely manner and in the form required," as the statute states. The lower court rejected the applicability of the rule because the fact that segregated Revere data was not readily available "cannot be said to rise to the level of a refusal or inability to provide the requested information or a significant impediment, particularly given the critical importance of regional data to a regional investigation." [12]

Before analyzing further the parties' and lower court's views, we examine the rule itself, set forth above. We note the use of the mandatory term "shall," indicating that the ITC *must* use the best information otherwise available in the enumerated circumstances. This is reflected in the legislative history: [13]

> [This section] would provide that whenever a party or any other person refuses or is unable to produce information in a timely manner and in the form required, or otherwise significantly impedes an investigation, * * * the ITC *must* use the best information otherwise available. [Emphasis supplied.]

We also note the context of the best information rule: it is set within the extremely short statutory deadlines which the Congress built into the new antidumping law[14] and the resultant lack of time which the ITC has to wield its little-used subpoena power.[15] Thus cooperation by the parties to the investigation is essential, as well as diligence by the ITC staff, to gather the data needed for an accurate determination. Noncooperation by parties or other persons may, in the absence of ITC time to pursue judicial compliance, be penalized, at least in the eyes of those parties or persons, by the ITC's mandatory use of whatever other best information it may have available. In short, one may view the best information rule, as the ITC urges, as an investigative tool, which that agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest. One may as well view the rule, in light of the legislative history cited, as a club over the *ITC's* head, which Congress has brandished to force that agency to arrive at *some* determination within the time allotted. "Impossible" is a word which Congress does not want to hear in these complex cases.

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[10] Our jurisdiction of the lower court's opinion on this matter is found at 28 U.S.C. § 1295(a)(5), granting us exclusive jurisdiction "of an appeal from a final decision of the United States Court of International Trade." We review that court's review of an ITC determination by applying anew the statute's express judicial review standard.

[11] Section 1677e(b).

[12] *Atlantic Sugar V*, 573 F. Supp. at 1145.

[13] S. REP. NO. 249, 96th Cong., 1st Sess. 98, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 484.

With this in mind, we address more closely Atlantic Sugar's contentions that the ITC staff acted negligently in not requesting plant-by-plant data from Revere until near the end of the investigatory period, especially when it was clear since the May 1979 preliminary ITC injury determination that the ITC would need northeastern regional industry data, excluding Chicago. Moreover, Atlantic Sugar stresses that Revere's questionnaire response, which the ITC received in early to mid-January 1980, showed that Revere's sales outside the northeastern region had decreased, on a percentage basis, far more than those within the region. This should have caused the ITC staff to suspect that Revere's Chicago plant was worse off than the Boston and Brooklyn plants, Atlantic contends, thus distorting and pulling downward the firm-wide statistics.[16] Finally, Atlantic argues that there was no reason why the ITC staff could not obtain such plant-by-plant data from Revere, when it could and did obtain it from the region's largest producer, Amstar.[17]

While it may be true that the ITC staff might have been more aggressive in pursuing plant-by-plant data for Revere as it did with Amstar, we are not here reviewing the ITC's diligence. Nothing in the best information rule or its legislative history defines a standard of investigative thoroughness.[18] Rather, Atlantic Sugar's concerns go to the question of the evidence on the record for the injury determination, as discussed below. If that evidence is insubstantial, then the reviewing court must either reverse the ITC's determination or remand the case for further fact-finding. Implicit in such a reversal or remand would be the reviewing court's finding that some person or institution, whether the parties or ITC or all, inadequately collected and/or interpreted the data.

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[14] The Senate Report states that "a major objective of this revision of the antidumping duty law is to reduce the length of an investigation." *Id.*, S. REP. NO. 249 at 75, 1979 U.S. CODE CONG. & AD. NEWS at 461.

[15] Section 1333.

[16] At the time the ITC was gathering this data it expected it could use its traditional aggregation approach, rather than the piecemeal methodology mandated by the lower court in *Atlantic Sugar III. See* discussion in part 2 *infra.*

[17] Amstar apparently possessed a head start in this type of data segregation because it had filed for trade adjustment assistance, necessitating a somewhat similar proof of injury. Sections 2271 *et seq.*

[18] *Cf.* discussion in *Haarman & Reimer Corp.* v. *United States,* 1 Ct. Int'l Trade 207, 209–10 (1981), and *Budd Co. Ry. Div.* v. *United States,* 507 F. Supp. 997, 1003–04 (Ct. Int'l Trade 1980), remanding to the ITC for further fact-finding.

The lower court's analysis of the best information rule also bears further discussion. That court simply did not believe that Revere was "unable" to provide the Chicago plant data. It rejected Revere's position that such data was "not readily available," because (1) "it is reasonable to expect that a large corporation such as Revere would maintain record of the separate operations of its plants" and (2), since a separate region was found, "it is reasonable to expect that data reflecting this separation would be readily ascertainable from those who are producers in the region." [19]

These views, however, are founded neither in the record nor in business and accounting reality. Amstar, the region's largest sugar producer, did not keep all its data on a plant-by-plant basis, necessitating extensive work by the ITC staff in separating the information. There is no reason why Revere, the region's second largest producer, should have so segregated its data, especially that which would have been most useful to the ITC on a plant-by-plant basis, profit and loss figures. As the ITC points out, many corporations, while collecting cost data by plant, calculate revenue and hence profit only on a company-wide basis, particularly where company marketing, sales, administrative, and management expenses are centralized. Moreover, it is inflating out of all proportion the importance of the laws with which the lower court deals to expect that business people and corporate accountants would keep their books with an eye to an obscure and wholly arbitrary statutory geographic region, which a relatively small Government agency might declare for the purposes of one antidumping injury investigation.

The lower court nevertheless went on to hold: [20]

> [E]ven if Revere was unable or unwilling to provide the regional data [excluding its Chicago plant], the information used by the ITC still does not constitute proper evidence. It is not simply weaker evidence substituted for stronger evidence. It is irrelevant and immaterial data substituting for evidence. *Its usefulness has been completely destroyed by the inclusion of the Chicago plant.* [Emphasis supplied.]

We see no basis for such an extreme conclusion. The lower court mentions the statutory regional industry provision, set forth above, as providing a "proscription against the use of data" from outside the region.[21] This is error, however, as that statute not only contains no such proscription but on its face stresses the need for intelligent approximations—*e.g.*, producers who "sell all or almost all of their production"; demand which is "not supplied, to any substantial degree"; producers of "all, or almost all, of the production." [22]

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[19] *Atlantic Sugar V,* 573 F. Supp. at 1145.

[20] *Id.*

In short, by rejecting all the Revere data, and from there the entire injury determination, because of the inclusion of figures for the Chicago plant, the lower court has thrown the baby out with the bath water. This is not an application of the best information rule, but rather an evidentiary and factual determination which the lower court should have made according to the substantial evidence standard, discussed below. We therefore hold that the ITC acted in accordance with law by invoking the best information rule, and, to the extent that the lower court has held otherwise, we reverse.

2. *Substantial Evidence on the Record*

Substantial evidence on the record means "more than a mere scintilla" and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence.[23] We therefore state the issue before us as whether the ITC's inclusion of the Revere Chicago plant data in its final affirmative determination of material injury to the United States sugar industry, defined to be a northeastern industry, by reason of dumped Canadian imports, so distorts or detracts from the evidence in favor of injury, as to render that evidence insubstantial on the record.

We note first the influence on this case of the methodology which the lower court declared to be required by law in a regional industry injury determination. In *Atlantic Sugar III* that court held that the statutory language "producers of all, or almost all, of the production within that [regional] market" [24] requires the ITC to examine each individual regional producer to determine if it is injured, exclude those that are not injured, and then examine those remaining to determine if they constitute "all, or almost all" of the producers.[25] This piecemeal approach differs sharply from the aggregation method which the ITC has traditionally used in both nationwide and regional injury determinations. Nevertheless, the ITC, though disagreeing strongly with the lower court's view,[26] complied with it. Because the parties have not squarely raised this issue on appeal,[27] we analyze the injury determination within the "piecemeal" framework.

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[21] *Id*, at 1144, citing *Atlantic Sugar IV*, 553 F. Supp. at 1058.

[22] Section 1677(4)(C).

[23] *SSIH Equip. S.A.* v. *U.S. Int'l Trade Comm'n*, 718 F.2d 365, 382, 218 USPQ 678, 692 (Fed. Cir. 1983), additional comments of Judge Nies, quoting from *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477, 488 (1951).

[24] Section 1677(4)(C).

[25] *Atlantic Sugar III*, 2 Ct. Int'l Trade at 300.

[26] *Sugars & Sirups from Canada*, USITC Investigation No. 731–TA–3 (final) (April 1982) (Additional Views on Regional Industry Analysis), *reprinted in* 47 Fed. Reg. 19,490 (May 5, 1982).

Since Revere produced approximately one-quarter of the sugar in the defined region during the period in question, whether substantial evidence exists for injury to Revere is determinative of the ITC's affirmative finding, assuming the piecemeal framework discussed above.[28] Evidence of material injury on the record which evidence the ITC found regarding Revere includes: declining sugar production from 1978 to 1979, as well as declining capacity utilization, person-hours worked and productively, and profits (all including Chicago plant data); declining total sales by Revere plants within the region (excluding Chicago) to regional customers from 1978 to 1979; and consistent underselling by one or both of the Canadian producers, sometimes by substantial margins, from 1978 to 1980.[29]

Evidence on the record detracting from the substantiality of the above includes, most significantly, the possible distorting impact of the Chicago plant figures. This impact may be estimated in several ways. First, the record does show an approximate (business confidential) figure for Revere's Chicago plant production which figure, while not the "small" or "minor" quantity as the ITC and Revere's president have characterized it, is at least less than a third of the aggregate Revere production figures. Thus we may conclude that the Chicago plant is likely smaller than the averaged size of the two northeastern region Brooklyn and Boston plants.[30] Secondly, the sales data, which the ITC did request and Revere did supply on a segregated basis, show that the sales of Revere's Chicago plant declined significantly more than those of the two northeastern plants. Nevertheless, sales of the northeastern plants did decline notably, and in absolute terms about the same amount as the larger regional producer Amstar. Thus, while the Chicago plant may have suffered worse sales declines, the northeastern plants suffered as well. Atlantic Sugar urges that the sharper decline at the Chicago plant would account for most of Revere's aggregate profit loss. This may be so to a disproportionate degree, but it is still reasonable to expect that the northeastern plants, with declining sales, experienced some declining profits as well. Finally, Atlantic Sugar urges that we reject the information about the Chicago plant provided by Revere's president in response to the ITC analyst's phone call. As reviewing court, we do not presume to weigh the credibility of those statements, but simply recognize their presence on the record as those reported of a businessman speaking generally about his business in both a hurried and self-serving context.

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[27] *See* ITC brief at 16, note 15, specifically declining to raise this matter. Appellant Amstar has raised this issue of law in a footnote in its main brief and in its reply brief; appellee Atlantic Sugar has not raised it. It is unfortunate that the parties have not squarely appealed and briefed the issue, since our review of the statute and legislative history indicates no basis for the lower court's holding. *See* thorough discussion in commissioners' additional views, note 26 *supra*, and the lower court's retreat from the rigidity of its holding in *Atlantic Sugar IV*, 553 F. Supp. at 1059–60.

[28] *Atlantic Sugar V*, 573 F. Supp. at 1145. The parties do not contest the ITC's affirmative injury finding for Amstar, the region's largest producer, and two other smaller producers, nor its negative injury finding with regard to two small regional producers.

[29] *Sugars & Sirups from Canada*, note 26 *supra*.

[30] When analyzed under the ITC's traditional aggregation approach, rather than under the lower court's piecemeal approach, the Chicago plant represents a very small percentage of the region's total sugar production.

In sum, considering as we have, the entire record with its confidential *in camera* evidence, and the points detracting from the substantiality of the evidence for injury to Revere, both as discussed here and as detailed further in Atlantic's briefs, we cannot find that this leaves so little evidence on the record as to be less than a "mere scintilla" or less than that which "a reasonable mind might accept as adequate to support a conclusion." To the contrary, we find that the ITC's determination regarding material injury to Revere is quite reasonable and supported by substantial evidence on the record. Considering the compromise which the ITC must make between a perfectly accurate and an extremely rapid determination under this complex statute, the absence here of the most important missing figures—segregated profit and loss data for the second largest regional producer—is not so debilitating as to render the final determination unsupported under the substantial evidence standard.

We *reverse* the lower court's finding of insubstantial evidence on the record to support the final ITC material injury determination, reinstate that determination, and order that the resulting antidumping order be reinstated as well.

REVERSED

AMERICAN HOSPITAL SUPPLY CORPORATION AND MASSACHUSETTS GENERAL HOSPITAL, APPELLANTS *v.* TRAVENOL LABORATORIES, INC., PFRIMMER & COMPANY, AND U.S. INTERNATIONAL TRADE COMMISSION, APPELLEES

Appeal No. 83-1401

745 F.2d 1

(Decided September 26, 1984)

E. Anthony Figg, of Washington, D.C., argued for appellants. With him on the brief were *G. Franklin Rothwell* and *Scott M. Daniels*.

Granger Cook, Jr., of Chicago, Illinois, argued for appellees, Travenol Laboratories, Inc., et al.

John R. Crossan, *Paul C. Flattery*, *Lawrence W. Flynn* and *Max D. Hensley*, of Chicago, Illinois, of counsel.

William E. Perry, of Washington, D.C., argued for appellee International Trade Commission. With him on the brief were *Michael H. Stein*, General Counsel, and *Michael P. Mabile*, Assistant General Counsel.

Appealed from: U.S. International Trade Commission.

Before SMITH, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and NIES, *Circuit Judge*.

SMITH, *Circuit Judge*.

In this unfair competition case under 19 U.S.C. § 1337 (1982), appellants American Hospital Supply Corporation and Massachusetts General Hospital (American) appeal from the determination of the U.S. International Trade Commission (Commission), that appellees Travenol Laboratories, Inc., and Pfrimmer & Company (Travenol) are not in violation of section 1337 because they do not infringe Fischer, U.S. patent No. 3,950,529 (the Fischer '529 patent). We affirm.

The Claimed Invention

The Fischer '529 patent, which is assigned to American, relates to an amino acid nutritional formulation for patients with liver disease, and a method of using that formulation. The formulation is a mixture of amino acids falling within a specific range of proportions. The formulation can be administered either intravenously or orally.

Liver-diseased patients need to receive sufficient protein for adequate nutrition, yet, these patients sometimes develop intolerance to protein which can result in hepatic encephalopathy,[1] which can in turn lead to coma or death. By restricting protein intake, the tendency of a liver-diseased patient to develop hepatic encephalopathy can be reduced; however, limitation of protein intake can lead to malnutrition. The claimed Fischer formulations are intended to provide adequate nutritional support while reducing the incidence or severity of hepatic encephalopathy. They are also used as a treatment for hepatic encephalopathy.

Claim 1 of the Fischer '529 patent is representative of the claims alleged to be infringed:

An amino acid formulation for administration to human patients with liver disease, comprising a mixture of the following essential and nonessential amino acids combined in proportions defined by the following interrelated molar ranges:

Amino acids	Molar ranges
L-isoleucine	0.0549–0.0823
L-leucine	0.0670–0.101
L-valine	0.0574–0.0861
L-tryptophan	0.000816–0.00441
L-phenylalanine	0–M
L-tyrosine	0–0.00300

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[1] Hepatic encephalopathy is a condition characterized by a depressed mental state, impaired consciousness, decreased intellectual performance, and an altered personality.

Amino acids	Molar ranges
L-lysine	0.0333–0.0500
L-methionine	0.00491–0.0147
L-threonine	0.0228–0.0454
L-alanine	0.0686–0.103
L-arginine	0.0275–0.0413
L-histidine	0.0124–0.0186
L-proline	0.0556–0.00834
L-serine	0.0152–0.0571
glycine	0.0451–0.144
L-aspartic acid	0–0.0451
L-glutamic acid	0–0.0702
L-ornithine	0–0.0382
L-cysteine	0–0.00228

wherein M represents the upper limit of the range for phenylalanine and is equal to 0.009 minus the respective molar amount of tyrosine present in said mixture, the combined molar amounts of phenylalanine and tyrosine being at least equal to 0.002 on the same respective molar basis, the respective molar proportions of isoleucine, leucine, valine, tryptophan, phenylalanine, and tyrosine being selected from the above molar ranges thereof so that the ratio of the combined molar proportions of isoleucine, leucine, and valine to (a) the molar proportion of tryptophan is within the numerical range from 40 to 300, and to (b) the combined molar proportion of phenylalanine and tyrosine is within the numerical range from 15 to 135.

Background

In 1949, Dr. William C. Rose published studies establishing minimum amounts of 20 amino acids needed by healthy persons—the "Rose pattern." Of these, eight amino acids are identified as essential,[2] two are sometimes identified as semi-essential,[3] and the balance are deemed nonessential.[4] The principal function of the normal liver in the human body is to regulate the levels of certain amino acids in the blood.

Proteins are normally obtained from food and are broken down into amino acids before they can be used for nourishment in the human body. Due to illness, surgery, or injury, however, some persons cannot gain nutritionally adequate quantities of protein through the alimentary tract and quickly develop malnutrition. Intravenous administration of amino acids formerly compensated partially for a patient's protein deficit. In the 1940's amino acid hydrolysates were prepared from proteins such as milk protein or hen's egg protein. By the mid-1960's, however, all of the amino acids necessary for human nutrition had become available in pure form at a reasonable cost. Further, surgical techniques for administration of nutritionally adequate quantities of amino acids had also become available.

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[2] The essential amino acids cannot be synthesized by the human body. Consequently, they must be provided by the diet or by other products which can be broken down into essential amino acids. The essential amino acids are valine, leucine, isoleucine, threonine, phenylalanine, tryptophan, methionine, and lysine.

[3] The "semi-essential" amino acids are histidine and arginine.

[4] The human body can synthesize the nonessential amino acids from products such as ammonia, carbohydrates, other nitrogen sources, and essential amino acids.

The technique of providing nutritionally adequate quantities of amino acids intravenously—hyperalimentation [5]—could not be used with all patients, however. Most people with liver disease can be treated by controlling their diet. Some patients with liver disease, particularly cirrhosis, develop hepatic encephalopathy or coma when fed protein. Consequently, malnutrition presents a serious problem to these patients.

Ammonia is formed in the gut from the breakdown of proteins. Based on observations showing an abnormally high ratio of ammoniagenic amino acids in the plasma of patients with certain liver diseases, it is thought by some that when the liver is not functioning properly excess ammonia builds up resulting in hepatic encephalopathy. In the early 1970's ammonia was thought to be the principal cause of hepatic encephalopathy and this theory is still widely accepted.

In a 1973 paper,[6] Dr. Rudman classified the ammoniagenic tendencies of amino acids metabolized in patients with liver disease.[7] Conventional treatments for controlling plasma ammonia levels, however, were not always successful; they sometimes caused malnutrition and did not always prevent hepatic encephalopathy.

In 1971, Dr. Fischer published an article [8] presenting an alternative hypothesis that some of the neurological and cardiovascular complications of hepatic failure could be caused by abnormally high levels of "aromatic" amino acids [9] relative to "branched chain" amino acids [10] in the plasma of liver-diseased patients. Fischer suggested that the aromatic and branched chain amino acids compete for passage into the brain, across the "blood-brain barrier." Branched chain amino acids are not regulated by the liver but, rather, through other metabolic pathways independent of the liver. The levels of aromatic amino acids in the plasma are regulated by the liver and, consequently, there is some relationship between a damaged liver and abnormally high levels of aromatic amino acids in the plasma. In liver-diseased patients the levels of aromatic amino acids are elevated, while the levels of branched chain amino acids are decreased. Fischer thought that aromatic amino acids were precursors of false neurotransmitters which disrupted normal brain functioning in patients with hepatic encephalopathy. Thus, Fischer proposed that hepatic encephalopathy may be caused by the excessive levels of aromatic, relative to branched chain, amino acids in the plasma.

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[5] Dr. Stanley Dudrick perfected a surgical technique for inserting a cannula—a small tube—into deep veins for administering concentrated nutritional solutions. This technique became known as hyperalimentation.

[6] Rudman, et al., *Comparison of the Effect of Various Amino Acids Upon the Blood Ammonia Concentration of Patients with Liver Disease*, 26 Am. J. of Clinical Nutrition 916 (1973).

[7] Threonine, serine, glycine, glutamine, histidine, lysine, and asparagine were shown to be the most ammoniagenic of the amino acids.

[8] Fischer & Baldessarini, *False Neurotransmitters and Hepatic Failure*, 2 LANCET 75 (1971).

[9] The aromatic amino acids are tryptophan, phenylalanine, and tyrosine.

[10] The branched chain amino acids are isoleucine, leucine, and valine.

It was known that certain amino acids were elevated in patients with specific types of liver disease. Prior to 1974, "normalization" of amino acid levels for patients with a specific enzyme deficiency was known. In normalization, a diet abnormally low in certain amino acids is given to patients whose levels in those amino acids prior to treatment were abnormally high, and vice versa. Normalization was not, however, a conventional treatment for patients with liver disease.

In 1972, Fischer entered into a collaborative research effort with American to formulate an amino acid product for patients with liver disease. The work initially involved two intravenous amino acid formulations: FreAmine, an amino acid product for patients with kidney disease, and FreAmine E, an experimental formulation. The results of that research effort, up to early 1973, were published in 1974.[11]

In the 1974 article Fischer suggested modifying amino acid formulations to normalize the pattern of amino acids in the plasma of patients with liver disease. the FreAmine E preparation tested by Fischer consisted of only the eight essential amino acids conforming to the Rose pattern. To Fischer's surprise, FreAmine E failed to increase the low plasma concentration of branched chain essential amino acids even though FreAmine E contained 2½ times the minimum requirements of branched chain amino acids recommended by Rose.

Following oral presentation in May 1973 of the report later published as the 1974 Fischer article, Fischer and Dr. Yoshimura devised a modified formulation intended to normalize plasma amino acid levels in liver-diseased patients. They called the formulation "F080." The ratio of branched chain to aromatic amino acids was much higher in the F080 formulation than in FreAmine. Fischer performed animal tests with the F080 formulation in 1974. Animals in a coma or near comatose states with simulated liver disease awakened when given the F080 formulation.

On August 17, 1972, Ghadimi filed an application for an "Injectable Amino Acid Composition Commensurate to the Anabolic Need of the Body and Method of Using Same." U.S. patent No. 3,832,465 (the Ghadimi patent) issued to Ghadimi on August 27, 1974, claiming a nutritional amino acid formulation. The Ghadimi patent does not address the specific problems of patients with liver disease but, rather, provides a formulation for the nutritional needs of patients from a variety of age groups—newborn to adult.

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[11] Fischer, et al., *Plasma Amino Acids in Patients with Hepatic Encephalopathy*, 127 AM. J. OF SURGERY 40 (1974).

On February 3, 1975, Fischer filed application serial No. 546,689. On the basis of that application, the Fischer '529 patent issued on April 13, 1976. The claims were allowed without discussion or amendment.

In May 1979, American began selling an amino acid formulation for liver-diseased patients made in accordance with claim 1 of the Fischer '529 patent as an enteral (food) product under the trademark "Hepatic-Aid." Travenol introduced a competing enteral amino acid formulation for nutritional support for liver-diseased patients, in the United States market in September 1981, under the trademark "Travasorb Hepatic."

Proceedings Below

On July 12, 1982, American filed with the U.S. International Trade Commission a complaint alleging violations by Travenol of 19 U.S.C. § 1337 (1982). The Commission investigated American's claim of infringement of claims 1, 5, and 14, and of contributory infringement and inducing infringement of claims 1, 5, 6, 7, 9, and 14, of the Fischer '529 patent. In an initial determination issued May 23, 1983, the presiding official held that the Fischer '529 patent is not invalid, is enforceable, and is not infringed by Travenol.

The presiding official rejected Travenol's contentions that the claims are invalid under 35 U.S.C. § 112 for vagueness, ambiguity, or indefiniteness, under section 102(e) in view of the Ghadimi patent, or under section 103 for obviousness in view of the 1974 Fischer article and the Ghadimi patent. While American was found to have misrepresented, and to have failed to disclose, certain information to the Patent and Trademark Office (PTO) during prosecution, that information was not found to be material, and the Fischer '529 patent was held to be enforceable. The Fischer '529 patent was not found to be infringed by Travenol because of difference between the claimed and the Travenol formulations. The presiding official evaluated equivalence at the time the invention was made and declined to recognize the reduced amounts of one amino acid in the Travenol formulation as equivalent to the claimed amount of that amino acid despite evidence that the minimum requirement of that amino acid was reduced subsequent to the time of Fischer's invention. In view of the alternative ammoniagenic theory of causation of hepatic encephalopathy, the presiding official concluded that American failed to meet its burden of proving that Travasorb Hepatic worked in substantially the same way as the claimed formulation.

The Commission declined to review the initial determination of no violation and, accordingly, the initial determination became final on June 22, 1983.[12] American appeals.

Issues

Three principal questions are raised by the parties [13] on appeal:

(1) Whether the asserted claims are invalid under either section 102(e) or section 103;

(2) Whether the appealed claims are unenforceable because of alleged misrepresentations or omissions made by American during prosecution of the Fischer '529 patent; and

(3) Whether Travasorb Hepatic infringes the asserted claims under the doctrine of equivalents.

Validity

Travenol contends that, while the Commission's determination that Travenol has not violated section 1337 is correct, the asserted claims are clearly invalid under section 102 or section 103 or both.

Travenol asserts that the Commission entered a variety of clearly erroneous findings of fact with respect to the teachings of the references. Many of these, however, are straw men stuffed with Travenol's misinterpretations of the Commission's findings. Further, we are not persuaded that the biochemistry involved was "predictable," as Travenol claims. Travenol ignores the findings and the evidence with respect to the complexity of normalizing plasma amino acid levels and with respect to the uncertainty surrounding the competing theories of treatment of hepatic encephalopathy.

The Fischer '529 patent claims a specific range of amino acid formulations for patients with liver disease. Contrary to the implication of some of Travenol's arguments, it does not claim the concept of normalizing plasma amino acid levels in the abstract.

Anticipation

Travenol asserts that the claims in issue are anticipated by the Ghadimi patent. In *Kalman* v. *Kimberly-Clark Corp.*,[14] this court stated:

> A party asserting that a patent claim is anticipated under 35 U.S.C. § 102 must demonstrate among other things, identity of invention. * * * [I]dentity of invention is a question of fact, * * * and one who seeks such a finding must show that each element of the claim in issue is found, either expressly de-

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[12] 48 Fed. Reg. 31306 (1983).

[13] This court on November 3, 1983, denied American's motion to exclude or strike issues 2, 3, 4, and 5 contained in Travenol's "Counterstatement of the Issues for Appeal." The instant case, in which the Commission's determination not to review applied to the full initial decision, is unlike *Beloit Corp.* v. *Valmet Oy*, No. 84-1296 (order) (Fed. Cir. Aug. 31, 1984), where the Commission specifically adopted only a portion of the presiding official's initial decision.

[14] *Kalman* v. *Kimberly-Clark Corp.*, 713 F.2d 760, 771, 218 USPQ 781, 789 (Fed. Cir. 1983).

> scribed or under principles of inherency, in a single prior art reference, or that the claimed invention was previously known or embodied in a single prior art device or practice. * * *

Travenol argues that the Commission's failure to recognize Ghadimi's teachings with respect to normalization is clearly erroneous and that the Commission erred in emphasizing the nonoverlapping portions of the ranges in the Ghadimi patent. We disagree.

First, we do not review the findings of the Commission under the clearly erroneous standard applicable to the findings of a district court as provided in Fed. R. Civ. P. 52(a). We review the factual findings of the Commission to determine whether they are unsupported by substantial evidence. We are not bound by the Commission's legal conclusions.[15]

While the Ghadimi patent teaches normalization of plasma amino acid levels, it does not disclose a formulation falling within the ranges of amino acids claimed by Fischer. Travenol's attempt to make out anticipation by drawing the court's attention to the overlap between portions of the Ghadimi ranges and the claimed ranges of amino acids—16 of 19 amino acids—appears to be little more than a diversion of attention from the three claimed amino acid ranges which Ghadimi does not disclose.[16]

While Ghadimi discloses a formulation using all of the 19 amino acids in the Fischer patent, it does not disclose any amino acid formulation that meets the asserted claims. There is no identity of invention. Thus, we conclude that the Commission's findings, that the asserted claims of the Fischer patent are not anticipated by Ghadimi, is supported by substantial evidence. The asserted claims of the Fischer '529 patent are not valid under section 102(e).

Obviousness

Travenol also argues that the asserted claims are invalid for obviousness under section 103 in view of either the 1974 Fischer article or the Ghadimi patent or both. Several of the Commission's findings of fact and statements of the law are designated by Travenol as clearly erroneous [17] and erroneous, respectively. The Commission employed the *Graham* v. *John Deere Co.*[18] criteria in determining whether the asserted claims would have been obvious under section 103. Travenol's attack is leveled primarily at the Commission's findings with respect to the unpredictibility of normalization techniques and with respect to the teachings of the 1974

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[15] 19 U.S.C. § 1337(c) (1982); 5 U.S.C. § 706 (1982); *SSIH Equip. S.A.* v. *U.S. Int'l Trade Comm'n*, 718 F.2d 365, 371, 218 USPQ 678, 684 (Fed. Cir. 1983); *General Motors Corp.* v. *U.S. Int'l Trade Comm'n*, 687 F.2d 476, 215 USPQ 484 (CCPA 1982), *cert. denied*, 459 U.S. 1105 (1983).

[16] The ranges for threonine and proline disclosed by Ghadimi are lower than the ranges claimed in the Fischer '529 patent. The range for cysteine is higher than the claimed range. The ranges for these three amino acids disclosed in Ghadimi do not overlap the ranges claimed for those amino acids in the Fischer '529 patent.

[17] *See supra* text accompanying note 15.

[18] *Graham* v. *John Deere Co.*, 383 U.S. 1, 17–18, 148 USPQ 459, 467 (1966).

Fischer article and the Gahdimi patent in terms of what would have been obvious to one of ordinary skill in the art.

There is no dispute with respect to the scope and content of the prior art—all parties agree that the 1974 Fischer article and the Ghadimi patent were properly considered the most pertinent prior art.

As Travenol correctly argues, the 1974 Fischer article plainly suggests that "the approach to total parenteral nutrition in patients with hepatic disease should include the normalization of plasma amino acid patterns." In view of the abnormal plasma amino acid pattern arising in liver disease, Fischer states that normalization of such patterns would be "beneficial." Ghadimi suggests the monitoring and adjustment of the plasma amino acid levels in formulating amino acid preparations for intravenous administration. Ghadimi also discloses that

> In the present state of knowledge it is not known exactly what level of free amino acids in the blood should be considered toxic. The magnitude of the problem becomes apparent when it is realized that "toxic effect" means long-range effects on the growing brain and hence subnormal brain function or even gross mental retardation not amenable to therapy by the time the long-range effect is detectable by conventional techniques.

The "toxic" effects addressed by Ghadimi, however, are not the same problems to which the Fischer '529 patent is directed.

While Ghadimi observed that "infusion of branched-chain amino acids (leucine, isoleucine, valine) substantially in excess of minimal or even 'safe' requirements (double the minimum) did not result in unduly raised amino acids in the plasma," there is no recognition in the Ghadimi patent that a formulation with a high ratio of branched chain to aromatic amino acids, such as that claimed by Fischer, would be beneficial to patients with severe liver disease. The failure of that infusion to raise plasma amino acid levels a certain degree suggested to Ghadimi only that the metabolic pathways of these amino acids lie outside the liver.

The Ghadimi patent is directed to providing adequate nutritional support to patients of all ages, without regard to liver disease. The claimed Fischer formulation is not disclosed by Ghadimi and is directed to a different class of users with specific unique nutritional problems. The 1974 Fischer article discloses no specific formulation. It suggests only that, in general, normalization may be beneficial. It does not, however, direct one how to proceed in developing an amino acid formulation that would result in normalized plasma amino acid levels while avoiding the risk of hepatic encephalopathy. In view of the mystery enshrouding hepatic encephalopathy, the Commission found that it was not clear that the concept would work. The Commission recognized that "obvious to try" is not a legitimate test of patentability under section 103.[19]

The level of ordinary skill in the art was found to be high, a finding repeatedly emphasized by Travenol in its brief on appeal. Travenol disputes that one possessing such a high level of skill would have found the technique or normalization unpredictable. The record clearly establishes that the prevailing wisdom at the time of the invention was that patients with hepatic encephalopathy were not fed protein for *any* reason, because it made their conditions worse. These patients were thought to be intolerant of protein. American's expert witness testified that, given the lack of background information on the causes of liver disease, normalization was unpredictable at the time of Fischer's invention. Thus, the Commission's finding is supported by substantial evidence.

Travenol also asserts that American failed to show any new and surprising result and that the Commission erred in accepting the alleged criticality of the claimed ranges. The burden of proving invalidity, however, was on Travenol. American is under no compulsion either to prove a new and surprising result or to prove the criticality of the claimed ranges of amino acids. Rather, the burden was on Travenol to establish the lack of new and surprising results or the lack of criticality. Travenol failed to prove either.

We hold that the Commission did not err in concluding that the Fischer '529 patent is not invalid for obviousness under section 103.

Enforceability

Travenol contends that American committed inequitable conduct by virtue of American's alleged breach of the duty of candor during prosecution of the Fischer '529 patent. The Commission found that, while at least one misrepresentation and a number of omissions were made during prosecution, none of these was material. Thus, no inequitable conduct was found. The legal standard of materiality applied by the Commission is cited by Travenol as error.

We agree that the Commission did not apply the standard of this court as set out in *Driscoll* v. *Cebalo.*[20] Because of the discussion of the issue of enforcement there, and because of our disposition of this appeal on the basis of noninfringement, we see no need to examine the issue of enforceability *de novo.*

Infringement

American did not allege literal infringement but, rather, alleged that Travenol infringes the asserted claims under the doctrine of equivalents. The Commission, however, declined to find infringement. The same result was found to be achieved by both the claimed product and Travasorb Hepatic—providing adequate nutrition to patients with severe liver disease who cannot tolerate normal proteins without suffering hepatic encephalopathy. However, Travenol was not found to use substantially the same means to achieve that result.

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[19] *In re Pantzer,* 341 F.2d 121, 124, 144 USPQ 415, 417 (CCPA 1965).

[20] *Driscoll* v. *Cebalo,* 731 F.2d 878, 884, 221 USPQ 745, 750 (Fed. Cir. 1984).

While Travenol copied the high ratio of branched chain amino acids to aromatic amino acids from the Fischer '529 patent, the molar ranges of five amino acids in the Travenol formulation fall below the claimed ranges.[21] The Fischer '529 patent teaches that the ratios of all 19 amino acids to each other should be maintained. Subsequently, as knowledge in the art advances, some of Fischer's claimed ranges were found to be too stringent. The Commission concluded, however, that the asserted claims could not be expanded by the doctrine of equivalents "as new information becomes available, and it is learned which ingredients and ratios in the formulation are important and which are not." The Commission found further that the proportions of many of the amino acids were changed in accordance with the competing ammoniagenic theory of treatment of hepatic encephalopathy.

American correctly contends that the Commission erred in determining equivalence at the time of invention without regard to subsequent developments in the art. In American's view the levels of several amino acids of Travasorb Hepatic falling below the claimed ranges would not impair the function of the alleged infringing product. American also argues that the Commission erred in restricting the claims in view of the prior art and in comparing Travasorb Hepatic to American's Hepatic-Aid, rather than to claim 1. American urges that the evidence compels a finding of infringement.

Travenol, however, argues that the claims are narrow and that the prior art is more pertinent to the claimed invention than is Travasorb Hepatic. Relying on Dr. Fischer's testimony regarding risk to the patient of formulations outside of the claimed ranges, Travenol asserts that there is no equivalence.

The Commission defends its finding of no infringement by accurately focusing on the difference in means between the claimed and the alleged infringing formulations. Citing the uncertain state of current knowledge of the mechanisms of hepatic encephalopathy, the Commission urges that American has failed to meet its burden of proof on infringement.

A finding of infringement under the doctrine of equivalents is a finding of fact.[22] Accordingly, we must affirm the Commission's finding unless it is unsupported by substantial evidence.[23]

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[21] The molar concentrations of threonine, alanine, proline, serine, and glycine in Travasorb Hepatic are below the molar ranges claimed in claim 1 of the Fischer patent. Of these, only threonine is essential. *See supra* note 2. Threonine, serine, and glycine were identified among the most ammoniagenic amino acids in a 1973 paper by Dr. Rudman. *See supra* note 7.

[22] *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 339 U.S. 605, 609, 85 USPQ 328, 331 (1950); *Thomas & Betts Corp.* v. *Litton Sys., Inc.*, 720 F.2d 1572, 1579, 220 USPQ 1, 6 (Fed. Cir. 1983).

[23] *See supra* text accompanying note 15.

The Commission recognized that the critical questions in this case with regard to infringement were "whether substantially the same ingredients achieve substantially the same results in substantially the same way, whether those with ordinary skill in the art would recognize certain ingredients as the equivalents of one another, and whether certain ingredients are not an essential part of the claimed invention." Contrary to American's assertion, the Commission assessed infringement with respect to the asserted claims, not American's commercial product.

Using a "common factor" approach to derive a comparable sample of Travasorb Hepatic to test against claim 1, the Commission found that Travasorb Hepatic fell outside of the claimed amino acid ranges with respect to 5 of 19 amino acids.[24] Of these, four—serine, alanine, proline, and glycine—are classified by Rose as nonessential. Thus, the lower-than-claimed levels of these nonessential amino acids would not impair the nutritional value of the formulation. Threonine, however, is classified by Rose as essential and, for that reason, its concentration in Travasorb Hepatic could have been considered to impair the nutritional value of the formulation at the time of the invention.

Subsequently, however, research revealed that the minimum requirement of threonine was much lower than the range claimed by Fischer. The Commission recognized that this was not known at the time of the invention and held that the scope of the claims of the Fischer patent cannot be read to cover subsequent advances. That conclusion is contrary to this court's precedent.

In *Hughes Aircraft Co.* v. *United States,*[25] this court, as had the Court of Claims,[26] held that variations in the invention, made possible by subsequent advances in the art, do not allow the accused infringing device to escape the "web of infringement." An appropriate range of equivalents may extend to post-invention advances in the art in an appropriate case.

As the Commission noted, the specification of the Fischer '529 patent teaches (1) that the relationships among amino acids set forth in the chart in claim 1 is important *and* (2) that the ratio of branched chain amino acids to aromatic amino acids is important. Travasorb Hepatic falls literally within the claimed range of ratios of branched chain amino acids to aromatic amino acids. The specification expressly teaches that, while the inclusion of nonessential amino acids is desirable, the formulation may include only essential amino acids. The level of threonine in the claimed formulation is maintained in a specific range not for reasons associated with the ratio of branched chain amino acids to aromatic amino acids but, rather, for nutritional reasons. Thus, subsequent advances in the prior art, indicating that less threonine is needed for nutritional purposes than previously had been thought, are consistent with the specification. The Commission erred in holding that subsequent advances could not be included within the scope of protection afforded the asserted claims. That error, however, does not merit reversal.

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[24] *See supra* note 20.

[25] *Hughes Aircraft Co.* v. *United States,* 717 F.2d 1351, 1365, 219 USPQ 473, 483 (Fed. Cir. 1983).

[26] *Bendix Corp.* v. *United States,* 600 F.2d 1364, 1382, 204 USPQ 617, 631 (Ct. Cl. 1979); *Decca Ltd.* v. *United States,* 544 F. 2d 1070, 1080–81, 191 USPQ 439, 447–48 (Ct. Cl. 1976); *Eastern Rotorcraft Corp.* v. *United States,* 397 F.2d 978, 981, 154 USPQ 43, 45 (Ct. Cl. 1968).

In view of our disposition of the remaining question—whether Travasorb Hepatic works in substantially the same way as the claimed invention—we need not, and do not, decide whether the Commission's finding, that Travasorb Hepatic and the claimed formulation do not perform substantially the same function, is unsupported by substantial evidence.

The difference in threonine levels is significant for another reason. Threonine is identified by Dr. Rudman in his 1973 article as among the most ammoniagenic amino acids. The Commission found the theory, that ammonia causes hepatic encephalopathy, has continuing vitality and found that many of the amino acids whose proportions in Travasorb Hepatic were changed by Travenol are important in their effect on ammonia. Fischer testified that he thought the ratio of branched chain amino acids to aromatic amino acids was critical to this invention and was the key to hepatic encephalopathy. Fischer recognized however that there was no certainty with respect to knowledge about the causes of hepatic encephalopathy. The record clearly establishes that the cause and mechanism of hepatic encephalopathy were, and remain, unknown.

In view of that uncertainty, the Commission could readily have concluded that American failed to meet its burden of proving infringement. The record establishes the continued vitality of the competing theory of treating hepatic encephalopathy—reducing the levels of ammoniagenic amino acids. While we do not adopt the Commission's reasoning, we conclude that the Commission's finding, that Travasorb Hepatic does not infringe the asserted claims of the Fischer '529 patent under the doctrine of equivalents, is supported by substantial evidence.

Conclusion

In summary, the asserted claims of the Fischer '529 patent are not anticipated by the Ghadimi patent, nor are they invalid for obviousness under section 103 in view of the 1974 Fischer article or the Ghadimi patent, either alone or in combination. We conclude that the Commission's finding that the asserted claims of the Fischer '529 patent are not infringed under the doctrine of equivalents is supported by the substantial evidence. In view of the competing "ammoniagenic" theory of hepatic encephalopathy, American did not meet its burden of proof in demonstrating that Travasorb Hepatic functions in substantially the same way as the claimed formulation. Accordingly, we sustain the Commission's determination that Travenol has not violated 19 U.S.C. § 1337.

AFFIRMED

UNPUBLISHED OPINIONS

Miodrag Nikolic v. The United States, Appeal No. 83-1100, *Affirmed*, December 15, 1983, opinion by Kashiwa, *Circuit Judge*

Associated Consumers v. The United States, Appeal No. 83-1085, *Affirmed*, December 23, 1983, opinion by Miller, *Circuit Judge*

Toho Ganryo Kogyo KK, et al. v. U.S.I.T.C., et al., Appeal No. 83-1255, *Affirmed*, April 10, 1984, opinion by Nies, *Circuit Judge*

Spearhead Industries, Inc. v. The United States, Appeal No. 84-679, *Affirmed*, June 18, 1984, opinion Per Curiam

Greenhalgh Mills Corp. v. The United States, Appeal No. 84-807, *Affirmed*, September 26, 1984, opinion by Cowen, *Senior Circuit Judge*

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